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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 210

THE PULLMAN COMPANY, H. J. HATCH, EDWARD
E. MEYERS AND A. J. KASH, PETITIONERS,

vs.

MRS. GARNETT V. JENKINS AND ROBERT W. JEN-
KINS, BY MRS. GARNETT V. JENKINS, HIS
GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] Names and addresses of attorneys omitted in printing.

[fol. 2] Citation, in usual form, showing service on Robert Brennan et al., omitted in printing.

[fols. 3-4] Affidavit of service of appeal papers omitted in printing.

[fol. 5]

**IN SUPERIOR COURT OF CALIFORNIA IN AND FOR
THE COUNTY OF LOS ANGELES**

No. 393404

MRS. GARNETT V. JENKINS, and ROBERT W. JENKINS, by
Mrs. Garnett V. Jenkins, His Guardian ad Litem, Plain-
tiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation; THE PULLMAN
COMPANY, a Corporation; A. J. Kash, B. A. Hatch, John
Doe One and John Doe Two, Defendants

COMPLAINT—Filed September 27, 1935

Damages

(Wrongful Death)

Come Now the plaintiffs, and for a cause of action against
the defendants, and each of them, complain and allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under
the age of twenty-one (21) years, to-wit: of the age of
nineteen (19) years.

II

That on the 27th day of September, 1935, in the County
of Los Angeles, State of California the above named plain-

tiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

[fol. 6]

III

That at all times herein mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended without interruption through the State of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in inter-state commerce between the States of California, Nevada, Arizona and other states.

IV

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the aforesaid States and authorized to do business in the State of California.

V

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a corporation, [fol. 7] has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment

and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VI

That the said defendant, B. A. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name is not at this time known to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, at all times herein mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name is at this time unknown to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, on the 29th day of March, 1935 and at all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the [fol. 8] 29th day of March, 1935, as will be hereinafter specifically set forth.

VII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States, but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, with the terminal for said Robert L. Jenkins at San Luis Obispo,

California, on train number 75, as plaintiffs are informed and believe and therefore allege, and known as "The Lark", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as such conductor of said train as aforesaid, with his terminal on said day at San Luis Obispo, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment, was called to the Pullman car by the Pullman conductor, defendant B. A. Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, B. A. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to [fol. 9] subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, B. A. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, A. J. Kash, from said train at Ventura, California; that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he struck the said Robert L. Jenkins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which

hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

[fol. 10]

VIII

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855 of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, John Doe One, whose name plaintiffs do not at this time know, but who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 negligently, carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to board on said [fol. 11] day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner, using profanity and threatening to enter said passenger station and go in and through

the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agent and employee, John Doe Two, permit the said defendant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor did said defendant, The Pullman Company, by and through its said employee as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

IX

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert [fol. 12] L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

X

That at the time of the injury referred to, the said Robert L. Jenkins, was earning from his said occupation as aforesaid the sum of \$221.00 per month; that at the time of the death of the said Robert L. Jenkins, he was fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased, Robert L. Jenkins, had a life expectancy of 70.08 years.

XI

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein, Mrs. Garnett V. Jenkins, who was

wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

XII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, defendants, B. A. Hatch, John Doe One and John Doe Two.

XIII

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of [fol. 13] the said Robert L. Jenkins, deceased, to their damage in the sum of \$50,000.00.

For a cause of action against the defendant, A. J. Kash, plaintiffs allege:-

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named, plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purpose of this action.

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the defendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, quarrelsome and boisterous manner [fol. 14] pass through the gates in said passenger station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Francisco, and that said defendant did approach and board The Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without having any permission or fare or ticket to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said loud and unusual tone of voice and tumultuous conduct, threatenings, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor requested the defendant, A. J. Kash, to leave the train, but that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until [fol. 15] said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, de-

ceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk and disorderly as aforesaid, and as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation violently attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which blow caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, [fol. 16] and that the said Robert W. Jenkins is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving and affectionate husband and father, generously providing for the health, comfort and maintenance of his said family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a rail-

road conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of \$221.00 per month; that by reason of the said death of said Robert L. Jenkins as hereinabove set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindness, love and affection, to their damage in the sum of \$50,000.00.

Wherefore plaintiffs pray judgment as follows:

1. On their first cause of action, againsts the defendants, and each of them, for the sum of \$50,000.00;

2. On their second cause of action, against the defendant, A. J. Kash, for the sum of \$50,000.00;

3. For their costs herein expended, and

[fol. 17] 4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Duly sworn to by Mrs. G. V. Jenkins. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 18] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

AMENDED COMPLAINT—Filed November 25, 1935

Come Now the plaintiffs and file their amended complaint herein and for cause of action against the defendants, and each of them, complain and allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

[fol. 19]

III

That at all times herein mentioned the defendant, Southern Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended without interruption through the States of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in interstate commerce between the States of California, Nevada, Arizona and other states, and was engaged in inter-state commerce as aforesaid on the 29th day of March, 1935.

IV

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the aforesaid States and authorized to do business in the State of California.

[fol. 20]

V

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a

corporation, has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VI

That the said defendant, H. J. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name is not at this time known to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, at all times herein mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name is at this time unknown to plaintiffs, but when same is ascertained plaintiffs will amend their complaint to show the true name of said defendant, on the 29th day of March, 1935 and at all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to [fol. 21] said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the 29th day of March, 1935, as will be hereinafter specifically set forth.

VII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States,

but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, said defendant, Southern Pacific Company, being engaged on said 29th day of March, 1935 in inter-state commerce as aforesaid, with the terminal for said Robert L. Jenkins at San Luis Obispo, California, on train number 75, as plaintiffs are informed and believe and therefore allege, and known as "The Lark", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as such conductor of said train as aforesaid, with his terminal on said day at San Luis Obispo, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment, was called to the Pullman car by the Pullman conductor, defendant H. J. [fol. 22] Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, H. J. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, malicious, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, H. J. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, H. J. Kash, from said train at Ventura, California; that just as said

defendant, H. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of [fol. 23] the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

VIII

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855 of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, John Doe One, whose name plaintiffs do not at this time know, but who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 [fol. 24] negligently carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to

board said train on said day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said train, "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner using profanity and threatening to enter said passenger station and go in and through the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agent and employee, John Doe Two, permit the said defendant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor did said defendant, The Pullman Company, by and through its said employees as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

[fol. 25]

IX

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

X

That at the time of the injury referred to, the said Robert L. Jenkins was earning from his said occupation as aforesaid the sum of \$221.00 per month; that at the time of the death of the said Robert L. Jenkins he was

fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased Robert L. Jenkins, had a life expectancy of 70.08 years.

XI

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein Mrs. Garnett V. Jenkins, who was wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

XII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, H. J. Hatch, John Doe One and John Doe Two.

XIII

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, [fol. 26] Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of the said Robert L. Jenkins, deceased, to their damage in the sum of \$50,000.00.

XIV

That the plaintiffs bring this action as against the defendant, Southern Pacific Company, a corporation, under and by virtue of Chapter 2, Section 51, Title 45 of the United States Codes, which provides, among other things, that every common carrier by railroad while engaged in commerce between any of the several States or Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow and children of such employee, for such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier.

For a cause of action against the defendant, A. J. Kash, plaintiffs allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purpose of his action.

[fol. 27]

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the defendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, malicious, quarrelsome and boisterous manner pass through the gates in said passenger station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, as these plaintiffs are informed and believe and therefore allege, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Fran-

cisco, and that said defendant did approach and board the Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without having any permission or fare or ticket, as plaintiffs are informed and believe and therefore allege, to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said [fol. 28] loud, malicious and unusual tone of voice and tumultuous conduct, threatening, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and, as plaintiffs are informed and believe and therefore allege, did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor requested the defendant, A. J. Kash, to leave the train, but that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, deceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California, to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California, the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as [fol. 29] aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk and disorderly as aforesaid, and

as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation, violently, wilfully and maliciously attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which blow caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, and that the said Robert W. Jenkins, plaintiff herein, is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving, and affectionate husband and father, generously providing for the health, comfort and maintenance of his said family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a railroad conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did [fol. 30] on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of \$221.00 per month; that said striking of the husband of plaintiff, Mrs. Garnett V. Jenkins, and father of plaintiff, Robert W. Jenkins, the said Robert L. Jenkins, deceased, by the defendant, A. J. Kash, which caused his injury and death, was wilful and malicious and against the will of said deceased, Robert L. Jenkins; that by reason of the said death of said Robert L. Jenkins as hereinabove

set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindless, love and affection, to their damage in the sum of \$50,000.00.

Wherefore plaintiffs pray judgment as follows:

1. On their first cause of action, against the defendants, and each of them, for the sum of \$50,000.00;
2. On their second cause of action, against the defendant, A. J. Kash, for the sum of \$50,000.00.
3. For their costs herein expended; and
4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Verified.

[File endorsement omitted.]

[fol. 31] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

NOTICE OF MOTION FOR REMOVAL—Filed November 20, 1935

To the Plaintiffs above named; and to L. H. Phillips, Esq.,
Their Attorney:

You and Each of You will please take notice that on Monday, November 25, 1935, at 10:00 o'clock A. M. thereof, or as soon thereafter as counsel can be heard, The Pullman Company, a corporation, defendant in the above entitled action, will present to the Superior Court of the State of California in and for the County of Los Angeles, Department 35 thereof, at the City Hall in the City of Los Angeles, said County and State, its petition for and bond on removal of the above entitled action in the above entitled court to the District Court of the United States for the Southern District of California, Central Division, pursuant to the [fol. 32] statutes in such cases made and provided; and that a copy of said petition and a copy of said bond, together

with a copy of the proposed order of removal are hereunto annexed and made a part hereof.

Dated November 20, 1935.

Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for The Pullman Company.

Received copy of the within Notice of Removal this 20 day of Nov. 1935.

L. H. Phillips, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 33] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

PETITION FOR REMOVAL—Filed November 20, 1935

Comes Now The Pullman Company, a corporation, and presents this its petition for the removal of the above entitled cause to the District Court of the United States, for the Southern District of California, Central Division, and in that behalf respectfully shows:

I

That The Pullman Company, a corporation, is defendant in the above entitled action. That at the time of the commencement of said action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Chicago, in said State, and that it is not now and was not at the time of the commencement of this action and never has been a corporation organized and existing under and by virtue of the laws of the State of California. That it was at all of said times and that it is now a citizen and resident of the State of Illinois, and that it is not now and [fol. 34] was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of the State of Illinois, and a non-resident of the State of California.

II

That Mrs. Garnett V. Jenkins, and Robert W. Jenkins by Mrs. Garnett V. Jenkins his Guardian ad litem, plaintiffs in the above entitled action, were at the time of the commencement of said action and ever since have been and now are citizens and residents of the State of California, and that said plaintiffs were not at any of the said times and are not now citizens or residents of the State of Illinois, but at all of said times plaintiffs were and now are non-residents of the State of Illinois.

III

That the above entitled action is a suit of a civil nature brought by plaintiffs to obtain a judgment against your petitioner for the sum of \$100,000.00 as damages alleged to have been sustained by plaintiffs on account of the death of Robert L. Jenkins on or about March 29, 1935, while working as a passenger conductor on a railroad train operating between Los Angeles and San Francisco, California.

IV

That the complaint in said action was filed on or about the 27th day of September, 1935, and was served upon your petitioner on or about October 29, 1935, in San Francisco, California. That according to the laws of the State of California, the time within which your petitioner is required to appear, answer, demur or otherwise plead to said action has not yet expired, and your petitioner has not [fol. 35] answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V

That the amount in controversy in the above entitled action exceeds exclusive of interest and costs the sum and value of \$3,000.

VI

That this is a suit in which there is a separable controversy between citizens of different states, and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

VII

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will within thirty (30) days from the filing of this petition enter a certified copy of the record in the above entitled cause in the United States District Court, for the Southern District of California, Central Division, and that your petitioner will pay all costs that are awarded by the said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that this Court accept this petition and said bond and surety, and that said action be removed into said District Court of the United States, for the Southern District of California, Central Division, pursuant to the statutes in such cases made and provided, and that this Court proceed no further in this action, except [fol. 36] to make the Order of Removal as prayed for, accept and approve the Bond presented herewith, and direct the Clerk of this Court to prepare a certified copy of the record in the above entitled action for entry in the said District Court of the United States, for the Southern District of California, Central Division.

And your petitioner will ever pray, etc.

November 20, 1935.

The Pullman Company, a Corporation, by Robert Brennan, Leo E. Sievert, H. K. Lockwood, Attorneys for Petitioner.

Verified.

Received copy of the within Petition for Removal this 20 day of Nov. 1935.

L. H. Phillips, Attorney for Plaintiffs. B.

[File endorsement omitted.]

[fols. 37-39] Bond on removal for \$500.00, approved and filed November 20, 1935, omitted in printing.

[fol. 40] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ORDER GRANTING PETITION FOR REMOVAL—November 25, 1935

Petition and Bond on removal to the United States District Court in and for the Southern District of California, Central Division of defendant Pullman Company come on for hearing, L. H. Phillips appearing as attorney for plaintiff and Brennan, Sievert and Lockwood for defendants; said petition is granted and bond approved.

[fol. 41] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ORDER OF REMOVAL—Filed November 25, 1935

The Pullman Company, a corporation, defendant in the above named action, having, within the time provided by law, filed its petition in due form for the removal of said action to the District Court of the United States for the Southern District of California, Central Division, and having at the same time offered a good and sufficient Bond, as required by law, and said Bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States for the Southern District of California, Central Division:

Now, Therefore, it is Hereby Ordered that said action be removed into the District Court of the United States for [fol. 42] the Southern District of California, Central Division, and that all further proceedings in this Court in said action be and they are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in said United States District Court.

Done this 25th day of November, 1935.

Robert W. Kenny, Judge.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ANSWER TO COMPLAINT—Filed December 16, 1935

Now Comes Defendant A. J. Kash and answering the first count of the complaint herein, denies and alleges:

I

Alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations of paragraphs I, II, III, IV, V, VI, VII, VIII, X, XI and XII of said first cause of action (except as hereinafter specifically denied), and basing his denial on said ground denies each and all of the allegations of said paragraphs.

[fol. 44]

II

Denies that this defendant was at any time causing a disturbance in any Pullman sleeping car and denies that this defendant was in any such car in an intoxicated condition and that his conduct was unruly, objectionable, tumultuous, offensive, threatening, quarrelling, or challenging to fight. Denies that this defendant used vulgar, profane, or indecent language in the presence or hearing of women passengers in said car or otherwise, or in a loud or boisterous manner, and denies that this defendant made himself objectionable to and annoyed other passengers in said Pullman car. Denies that Robert L. Jenkins or B. A. Hatch requested defendant to cease any objectionable conduct and that said defendant continued any objectionable or loathsome conduct. Denies that it was necessary for said Jenkins to call any police to assist in ejecting this defendant from any train. Denies that as this defendant was being taken from said train, or at any time, he struck said Jenkins a terrific or any blow on his head. Denies that any such blow injured said Jenkins or affected his brain or caused hemorrhage of the right frontal lobe of his brain or subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, or elsewhere, and denies that said Jenkins died as the result of any act of this defendant on April 19th or at any time. Denied that this defendant was in an intoxicated condition or conducting himself in a loud or boisterous manner or using profanity

or was in a drunken condition or was acting in a disorderly, boisterous, or threatening manner, as alleged in said complaint.

[fol. 45]

III

Denies all of the allegations of paragraph IX of said first cause of action. Denies all of the allegations of paragraph XIII of said first cause of action and particularly denies that by reason of any act or neglect of this defendant plaintiffs or any of them have been damaged in the sum of \$50,000.00 or any sum.

And answering the second cause of action of plaintiffs' complaint, defendant denies and alleges as follows:

I

Alleges that he has no information or belief on the subject sufficient to enable him to answer the allegations of paragraphs I, II, III, V, and VI of said second cause of action (except as hereinafter expressly admitted or denied), and basing his denial on said ground, denies each and all of the allegations contained in said paragraphs excepting such as are hereinafter admitted or denied.

II

Admits that this defendant has been and now is a resident of the State of California.

III

Denies that any attack upon Robert W. Jenkins by this defendant was unlawful. Denies by reason of any act of this defendant plaintiffs have been damaged in the sum of \$50,000.00 or any sum at all.

[fol. 46]

IV

Denies all of the allegations of paragraph IV excepting the allegation that a train known as "The Lark" travels between Los Angeles and San Francisco and admits said allegation.

As a further and separate defense to each of the causes of action of said complaint, this defendant alleges that if this defendant at any time struck Robert W. Jenkins, then he did so in self-defense and in the reasonable belief that

it was necessary for him to do so to protect himself against harm and injury.

Wherefore this defendant prays that plaintiffs take nothing by their complaint and that he be hence dismissed with his costs herein incurred.

Livingston & Livingston, Attorneys for Defendant
A. J. Kash.

Verified.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

MRS. GARRETT V. JENKINS, and ROBERT W. JENKINS, by Mrs. Garnett V. Jenkins, His Guardian ad Litem, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation; THE PULLMAN COMPANY, a Corporation, et al., Defendants

STIPULATION RE SUBSTITUTION—Filed December 27, 1935

It is Hereby Stipulated by and between plaintiffs and the defendants, The Pullman Company and H. J. Hatch, through their respective counsel, that Mrs. Garnett V. Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, may be substituted as party plaintiff in the above entitled cause in the place and stead of Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem.

Dated this 16th day of December, 1935.

L. H. Phillips, Attorney for Plaintiffs. Robert Brennan [fol. 48] nan, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company. Robert Brennan & M. W. Reed, Attorney for Defendant, H. J. Hatch.

ORDER

Pursuant to the above stipulation, and good cause appearing therefor,

It is Hereby Ordered that Mrs. Garnett V. Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, be and is hereby substituted as party plaintiff in the above entitled cause.

Dated this 27th day of December, 1935.

Leon R. Yankwich, Judge.

[File endorsement omitted.]

[fol. 49] IN UNITED STATES DISTRICT COURT

DEMURRER OF H. J. HATCH—Filed January 17, 1936

Comes Now H. J. Hatch, one of the defendants herein above named, and demurs to the amended complaint on file herein on the ground that the same does not state facts sufficient to constitute a cause of action against him.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated, January 17, 1936.

POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Sections 430 and 431 Code of Civil Procedure of the State of California.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

MOTION TO REMAND TO STATE COURT—Filed January 22, 1936

To the Pullman Company, H. J. Hatch and Edward E. Myers, and to Robert Brennan, M. W. Reed, Leo E. Sievert and H. K. Lockwood, Their Attorneys:

Now Comes the plaintiffs in the above entitled cause and moves this court to remand the above entitled cause to the Superior Court of the State of California in and for the County of Los Angeles on the grounds that this court is without jurisdiction to hear and determine the cause, particularly in that:

(a) That the above entitled cause and action is not a controversy wholly between citizens of different states.

(b) That the defendants, H. J. Hatch and Edward E. Myers, are now and at all times referred to in the above entitled action residents of the County of Los Angeles, State of California, and citizens of the State of California.

(c) That the defendant, Edward E. Myers, sued herein as John Doe One, has heretofore, to-wit: on or about the 14th day of January, 1936, been served with summons and complaint in the City of Los Angeles, County of Los Angeles, State of California; that said defendant, Edward E. Myers, was sued in the above entitled action in the Superior Court of the State of California in and for the County of Los Angeles, which action therein is numbered 393404.

(d) That the action against the above named defendants is not a separable controversy but that all of the defendants are jointly responsible and liable;

[fol. 51] (e) That the defendant, The Pullman Company, a corporation, heretofore filed its petition for removal of the above entitled case in the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court, which said petition was heard by the Honorable Robert W. Kenny, as judge of said Superior Court, and was on the 25th day of November, 1935 granted by the said Superior Court.

(f) That the petition seeking the removal of the above entitled action from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court was based upon the ground set forth in said petition, to-wit: that the above entitled action is a controversy between citizens of different states and a separable controversy as between the plaintiffs and defendant, The Pullman Company.

(g) That the petition for removal of the above entitled cause from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court was not joined in by all of the parties defendant or consented to by plaintiffs, but the motion based upon said petition for removal was opposed by plaintiffs and granted by the said Superior Court.

(h) That none of the defendants in the above entitled action were included or complained against for the sole or any purpose to prevent the removal of the case at bar from the State to the Federal Court.

(i) That the original jurisdiction of the above entitled action was and is in the Superior Court of the State of California in and for the County of Los Angeles.

(j) That the liability of the defendant is joint and several and sufficiently pleaded; that the complaint in the case [fol. 52] at bar is an action against the defendants as joint tort feorsors.

(k) That the bond for removal submitted by the defendant, The Pullman Company, now on record in the Superior Court of the State of California in and for the County of Los Angeles is not sufficient, legal or valid, or in conformity with the statutes in such cases made and provided, particularly in that said bond on removal and the application thereof on the part of National Surety Corporation, a corporation, as surety does not include all of or refer to all of the defendants, Edward E. Myers and H. J. Hatch not being mentioned or referred to in said bond on removal.

(l) That the original records and files in the case at bar are now, and have been at all times since the commencement of the above entitled action in the Superior Court of the State of California in and for the County of Los Angeles on file in said Superior Court, and that there has been filed in the above entitled court a certified copy of said original files.

(m) That none of the defendants have filed any answer or pleading in the District Court of the United States, Southern District of California, Central Division, up to and including the time of the making of this motion to remand, except the defendant, The Pullman Company, and that the defendant, H. J. Hatch, filed a demurrer to plaintiffs' amended complaint.

That plaintiff has been obliged to and has incurred court costs and attorney's fees in the matter of presenting this [fol. 53] motion to remand and remove the above entitled action from the above entitled court to the Superior Court of the State of California in and for the County of Los

Angeles; and that the defendant, The Pullman Company, a corporation, has filed its bonds in said Superior Court to indemnify the plaintiffs for all costs by them expended in the event that the above entitled action was wrongfully removed from the Superior Court of the State of California in and for the County of Los Angeles to the above entitled court.

Wherefore Plaintiffs Pray:

1. That this motion to remand to the Superior Court of the State of California in and for the County of Los Angeles be granted.

2. That the plaintiffs be awarded all their court costs and attorney's fees by them incurred or expended and which plaintiffs pray this court against the defendant, The Pullman Company.

3. For such other and further relief as may seem meet, just and equitable in the premises.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SUSTAINING DEMURRER—January 29, 1936

This cause having been argued and submitted for decision upon the demurrer of H. J. Hatch to the Complaint, it is by the Court ordered that the demurrer is sustained, and plaintiff is allowed ten days in which to amend the complaint.

[fol. 55] IN UNITED STATES DISTRICT COURT

SECOND AMENDED COMPLAINT—Filed February 8, 1936

Come Now the plaintiffs and file their second amended complaint, and for cause of action against the defendants, and each of them, allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins for the purpose of this action.

III

That on the 10th day of December, 1935 the Superior Court of the State of California in and for the County of Los Angeles, upon application, did appoint Mrs. Garnett V. Jenkins administratrix of the Estate of Robert L. Jenkins, Deceased, and the said administratrix qualified as such administratrix on the 10th day of December, 1935 and ever since and is now the duly appointed, qualified and acting administratrix of the Estate of Robert L. Jenkins, deceased; that upon the 27th day of December, 1935, upon stipulation of counsel and order of the Superior Court of the State of California in and for the County of Los Angeles the said Mrs. Garnett V. Jenkins, as administratrix [fol. 56] of the Estate of Robert L. Jenkins, Deceased was substituted as party plaintiff in place and stead of Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad Litem.

IV

That at all times herein mentioned the defendant, Southern-Pacific Company, was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, doing business and having its place of business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of the railroad tracks, works and equipment and passenger trains hereinafter referred to; that at all of said times the railroad tracks of said defendant, Southern Pacific Company, a corporation, extended

without interruption through the States of California, Nevada, Arizona and other states and together with said works and equipment and passenger trains were used indiscriminately by defendant for inter-state and intra-state commerce, and that said defendant, Southern Pacific Company, a corporation, at all times herein mentioned was a common carrier by railroad engaged in inter-state commerce between the States of California, Nevada, Arizona and other states, and was engaged in inter-state commerce as aforesaid on the 29th day of March, 1935.

V

That the defendant, The Pullman Company, is a corporation organized and existing under and by virtue of the laws of the State of Illinois and doing business in the States of California, Nevada and Arizona and owning, operating and maintaining sleeping cars and sleeping car equipment for the purpose of carrying passengers for hire between the [fol. 57] aforesaid States and authorized to do business in the State of California.

VI

That plaintiffs are informed and believe and therefore allege that the defendant, Southern Pacific Company, a corporation, has an agreement with the defendant, The Pullman Company, a corporation, whereby and whereunder the latter's sleeping cars and sleeping car equipment are hauled and otherwise propelled by the railroad equipment and cars of the defendant, Southern Pacific Company, between the aforesaid States.

VII

That the said defendant, H. J. Hatch, at all times herein mentioned, was the agent and employee of the said defendant, The Pullman Company, and acting in the capacity of Pullman conductor on the 29th day of March, 1935.

That the said defendant, John Doe One, whose true name plaintiffs have learned since the filing of this cause to be Edward E. Myers, and plaintiffs therefore ask leave of court to amend said complaint showing said true name of John Doe One as aforesaid; that said defendant Edward H. Myers, sued herein as John Doe One, at all times herein

mentioned was the agent and employee of the defendant, The Pullman Company, and employed in the capacity of Pullman porter on the 29th day of March, 1935.

That the defendant, John Doe Two, whose true name plaintiffs have learned since the filing of this cause to be Fred M. Dolsen, and plaintiffs therefore ask leave of court to amend said complaint showing said true name of John Doe Two as aforesaid, on the 29th day of March, 1935 and at [fol. 58] all times herein mentioned was the agent and employee of the said defendant, Southern Pacific Company, a corporation, and employed in the capacity of gate tender stationed at the passenger depot in the City of Los Angeles, California, who examines tickets or passenger railroad fare before passengers enter through said gates to said passenger trains before departure from said depot.

That the said defendant, A. J. Kash, at all times herein mentioned, was a passenger on said Pullman car on the 29th day of March, 1935, as will be hereinafter specifically set forth.

VIII

That on the 29th day of March, 1935, at the time of the accident herein set forth, Robert L. Jenkins, now deceased, husband of the plaintiff, Mrs. Garnett V. Jenkins, and father of the plaintiff, Robert W. Jenkins, was employed by the defendant, Southern Pacific Company, a corporation, as passenger conductor between various points from Los Angeles, in the State of California, and other States, but particularly on said 29th day of March, 1935 was the conductor and in charge of the train running between Los Angeles and San Francisco, in the State of California, said defendant, Southern Pacific Company, being engaged on said 29th day of March, 1935 in interstate commerce as aforesaid, with the terminal for said Robert L. Jenkins at San Luis Obispo, California, on train number 75, as plaintiffs are informed and believe and therefore allege, and known as "The Ark", and was acting in the discharge of his duties as such on said day, and that on said 29th day of March, 1935 the said Robert L. Jenkins, now deceased, was ordered by the defendant, Southern Pacific Company, a corporation, to take charge as [fol. 59] such conductor of said train as aforesaid, with his terminal on said day at San Luis Obispo, California; that the said Robert L. Jenkins, now deceased, in the execution of said order and acting within the scope of his employment,

was called to the Pullman car by the Pullman conductor, defendant H. J. Hatch, between Oxnard and Ventura, California, to assist said Pullman conductor, H. J. Hatch, defendant herein, in the discharge of his said duty as such Pullman conductor for and in behalf of his employer, The Pullman Company, defendant herein, to subside a disturbance in said Pullman sleeping car which was being caused by the defendant, A. J. Kash, who was then in said Pullman car in an intoxicated condition, his conduct being unruly, malicious, objectionable, tumultuous, offensive, threatening, quarreling and challenging to fight, using vulgar, profane and indecent language in the presence and hearing of women passengers in said Pullman car and in a loud and boisterous manner in said Pullman sleeping car, making himself objectionable to and annoying other passengers in said Pullman car; that notwithstanding the divers requests by the said Robert L. Jenkins, deceased, and the defendant, H. J. Hatch, to cease his objectionable conduct, the said defendant, A. J. Kash, continued his said objectionable, loathsome conduct as aforesaid, until it became necessary for the said Robert L. Jenkins, deceased, who was then and there in charge as conductor of said train, to call the Ventura, California police to assist in ejecting the said defendant, H. J. Kash, from said train at Ventura, California; that just as said defendant, H. J. Kash, was being taken from said train on said 29th day of March, 1935 at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line, and as a result thereof he died on April 19th, 1935.

IX

That the rules and regulations established by the defendant, Southern Pacific Company, a corporation, and the defendant, The Pullman Company, a corporation, and particularly Rule No. 854, provide that disorderly persons must not be allowed to board trains nor use offensive language or other misconduct on said trains, and that the same should not be permitted in or about said cars, and that Rule No. 855

of said companies as aforesaid, provides that in the event persons are disorderly in and about said passenger coaches that said conductor or other officer in charge or employee of said defendant companies as aforesaid, shall eject said passenger or passengers from said train and are permitted to call to their assistance duly constituted peace officers of the State, City or County; that the rules of said companies as aforesaid, further provide, and Rule No. 891 particularly provides that no disorderly persons or loungers are permitted in and around the stations and station platforms and that said employees of said companies, in conformity with said rule of the defendants, must preserve order in and about said stations; that notwithstanding such rules and regulations and in violation thereof the said defendant, Southern Pacific Company, a corporation, by and through its duly authorized agent and employee, Fred M. Dolsen, sued herein as John Doe Two, whose name plaintiffs have [fol. 61] learned since the filing of said complaint to be Fred M. Dolsen, as aforesaid, who is commonly known as a gate tender, stationed in said passenger station at Fifth and Central Streets, in the City of Los Angeles, California, on the 29th day of March, 1935 negligently, carelessly and without notice or warning to the said Robert L. Jenkins, nor did the said Robert L. Jenkins, deceased, have knowledge that the said defendant, A. J. Kash, boarded said train or was permitted to board said train on said day as aforesaid, permitted the said defendant, A. J. Kash, to enter said station in the City of Los Angeles, at Fifth and Central Streets, and go through said passenger gates to board said train, "The Lark" on said 29th day of March, 1935 without displaying his ticket or his fare permitting him so to do, in an intoxicated condition, conducting himself in a loud and boisterous manner, using profanity and threatening to enter said passenger station and go in and through the passenger gates used and maintained by the said defendant, Southern Pacific Company, for the purpose of passengers entering and displaying their passenger fares so as to permit them to board said passenger trains, and that said defendant, The Pullman Company, notwithstanding said rules and regulations and in violation thereof did negligently and carelessly and without notice or warning to the said Robert L. Jenkins, deceased, by and through its duly authorized agents and employees, Edward E. Myers, sued herein as John Doe One, and the said H. J. Hatch, defendant herein, permit the said defend-

ant, A. J. Kash, on said 29th day of March, 1935, who was then in a drunken condition and in a disorderly, boisterous and threatening manner to board said Pullman sleeper, the name and number of which plaintiffs do not at this time know, without any passage fare or ticket of any kind, nor [fol. 62] did said defendant, The Pullman Company, by and through its said employees as aforesaid, demand from said defendant, A. J. Kash, to display or show his fare, if any he had, to permit him to board said train.

X

That by reason of said injuries caused by the negligence of said defendants, and each of them, as aforesaid, and as a proximate result of said negligence of the defendants, and each of them, as aforesaid, the said defendant, A. J. Kash, was permitted and caused to and did strike the said Robert L. Jenkins, deceased, on March 29th, 1935 as aforesaid, inflicting the injuries as aforesaid, proximately causing and resulting in his death on the 19th day of April, 1935.

XI

That at the time of the injury referred to, the said Robert L. Jenkins was earning from his said occupation as aforesaid the sum of \$221.00 per month; that at the time of the death of the said Robert L. Jenkins he was fifty-eight (58) years of age; that plaintiffs are informed and believe and therefore allege that according to the American Experience Tables of Mortality the deceased, Robert L. Jenkins, had a life expectancy of 70.08 years.

XII

That the said Robert L. Jenkins left surviving him a widow, plaintiff herein Mrs. Garnett V. Jenkins, who was wholly dependent upon him for her support, and left a minor child, plaintiff herein, Robert W. Jenkins, who was dependent upon him for his support.

[fol. 63]

XIII

That said defendants, Southern Pacific Company, a corporation, and The Pullman Company, a corporation, did control and direct the services of their said employees, H. J. Hatch, Edward E. Myers, sued herein as John Doe One, and Fred M. Dolsen, sued here as John Doe Two.

XIV

That by reason of the premises as aforesaid said widow, Mrs. Garnett V. Jenkins, plaintiff herein, and said son, Robert W. Jenkins, plaintiff herein, have been and throughout the remainder of their lives will be deprived of the comfort, society, protection and earning power and support of the said Robert L. Jenkins, deceased, to their damage in the sum of \$50,000.00.

XV

That the plaintiffs bring this action as against the defendant, Southern Pacific Company, a corporation, under and by virtue of Chapter 2, Section 51, Title 45 of the United States Codes, which provides, among other things, that every common carrier by railroad while engaged in commerce between any of the several States or Territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative, for the benefit of the surviving widow and children of such employee, for such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier.

[fol. 64] For a cause of action against the defendant, A. J. Kash, plaintiffs allege:

I

That the plaintiff, Robert W. Jenkins, is a minor under the age of twenty-one (21) years, to-wit: of the age of nineteen (19) years.

II

That on the 27th day of September, 1935, in the County of Los Angeles, State of California, the above named plaintiff, Mrs. Garnett V. Jenkins, was duly appointed by the Superior Court of the State of California in and for the County of Los Angeles the guardian of the above named Robert W. Jenkins, for the purposes of this action.

III

That plaintiffs are, and at all times herein mentioned, have been and now are residents of the City of Los Angeles, County of Los Angeles, State of California, and that the de-

defendant, A. J. Kash, at all times herein mentioned has been and is now a resident of the State of California.

IV

That on the 29th day of March, 1935 at about the hour of 8:00 o'clock P. M. of said day, the said defendant, A. J. Kash, in a drunken, tumultuous, offensive, threatening and quarrelsome manner, entered the passenger station of the Southern Pacific Railway Company located at Fifth and Central Streets, in the City of Los Angeles, California, and did in a threatening, malicious, quarrelsome and boisterous manner pass through the gates in said passenger [fol. 65] station, which said gates are maintained and used by the Southern Pacific Company to permit passengers who have purchased tickets to go through and board its trains, without displaying his ticket or fare to the gate man, nor did the said defendant, A. J. Kash, as these plaintiffs are informed and believe and therefore allege, have any ticket, fare or transportation privilege to pass through said gates or board any of the Southern Pacific Company trains, and did continue to Train Number 75, known as "The Lark", which train travels between Los Angeles and San Francisco, and that said defendant did approach and board the Pullman Company sleeper without displaying or showing his ticket or car fare or permission or privilege to board said sleeping car, and did, without any permission or fare or ticket, as plaintiffs are informed and believe and therefore allege, to ride on said train, continue to stay in said sleeping car and ride said train, and did continue said loud, malicious and unusual tone of voice and tumultuous conduct, threatening, quarreling and challenging to fight other passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; that the said defendant, A. J. Kash, did continue said objectionable conduct and, as plaintiffs are informed and believe and therefore allege did refuse to pay his train fare and Pullman fare permitting him to ride in said car, and that he did refuse to desist his objectionable conduct and the use of profanity notwithstanding the divers and numerous requests of said Pullman conductor then in charge and control of said Pullman sleeping car as employee and agent of The Pullman Company; that the conduct of the defendant, A. J. Kash, continued until nearing the City of Ventura, California, and that said Pullman conductor

requested the defendant, A. J. Kash, to leave the train, but [fol. 66] that said defendant refused to leave said train and continued his objectionable conduct as aforesaid until said Pullman conductor was obliged to call to his assistance the conductor in charge of said train, Robert L. Jenkins, deceased; that the said Robert L. Jenkins, deceased, requested said defendant, A. J. Kash, to desist his objectionable conduct in said car and to pay his train fare, but that the said defendant, A. J. Kash, failed and refused to cease his objectionable conduct as aforesaid, and continued his quarreling and threatening conduct, using vile profanity in the presence of passengers, including women passengers, and that the said Robert L. Jenkins was forced to call the police officers at Ventura, California, to eject the said defendant, A. J. Kash; that upon arriving in the City of Ventura, California, the said Robert L. Jenkins, deceased, called said officers to eject the said defendant, A. J. Kash, by reason of his objectionable conduct as aforesaid, and upon arrival of said police officers on said train they placed the said A. J. Kash under arrest by virtue of being drunk and disorderly as aforesaid, and as they were about to remove and eject him from said train by virtue of his said conduct as aforesaid the said defendant, A. J. Kash, without cause or provocation, violently, wilfully and maliciously attacked, assaulted, trespassed and struck the said Robert L. Jenkins on the head with great force and violence, which caused the said Robert L. Jenkins, deceased, to suffer great, grievous and fatal injury, to-wit: hemorrhage of the right frontal lobe of brain with subdural hemorrhage, which hemorrhage [fol. 67] took place in the front part of the brain near the mid-line; that by reason of said injury, and as a direct and proximate result thereof the said Robert L. Jenkins died on the 19th day of April, 1935.

V

That the said plaintiffs, Mrs. Garnett V. Jenkins, is the widow of the said Robert L. Jenkins and an heir at law, and that said Robert W. Jenkins, plaintiff herein, is the minor son of the said Robert L. Jenkins, deceased, and is an heir at law of said Robert L. Jenkins, deceased.

VI

That at the time and place of the unlawful attack upon the decedent, said Robert L. Jenkins, and at all times prior

thereto the said Robert L. Jenkins was in possession of all of his faculties and in good physical condition and was a kind, loving and affectionate husband and father, generously providing for the health, comfort and maintenance of his family; that at the time the said Robert L. Jenkins received said injury aforesaid he was employed as a railroad conductor by the Southern Pacific Company, a corporation, residing at Los Angeles, California, and did on said 29th day of March, 1935 have charge as such conductor of said train as aforesaid from Los Angeles to San Luis Obispo, California, his terminal for said day, and at said time was earning as a salary as such conductor the sum of \$221.00 per month; that said striking of the husband of plaintiff, Mrs. Garnett V. Jenkins, and father of plaintiff, Robert W. Jenkins, the said Robert L. Jenkins, [fol. 68] deceased, by the defendant, A. J. Kash, which caused his injury and death, was wilful and malicious and against the will of said deceased, Robert L. Jenkins; that by reason of the said death of said Robert L. Jenkins as hereinabove set forth, plaintiffs herein have been forever deprived of his services, comfort, counsel, help, aid, support, companionship, kindness, love and affection, to their damage in the sum of \$50,000.00.

Wherefore Plaintiffs Pray Judgment as follows:

1. On their first cause of action, against the defendants, and each of them, for the sum of \$50,000.00;
2. On their second cause of action, against the defendant, A. J. Kash, for the sum of \$50,000.00;
3. For their costs herein expended; and
4. For such other and further relief as may seem meet and proper to the court.

L. H. Phillips, Attorney for Plaintiffs.

Verified.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO REMAND—February 19, 1936

This cause having been heard and submitted for decision upon the motion of the plaintiffs to remand to the Superior

Court of the State of California in and for the County of Los Angeles and having been considered, it is by the Court ordered that the motion to remand be and the same is hereby denied.

[fol. 70] ~~IN~~ UNITED STATES DISTRICT COURT

NOTICE OF ORDER—Filed February 21, 1936

To the Plaintiffs Above Named, and to L. H. Phillips, Esq.
Their Attorney:

You and Each of You will please take notice that an order was entered on the 19th day of February, 1936, denying the plaintiffs' motion to remand the above entitled cause to the state court.

Dated Los Angeles, February 21, 1936.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K.
Lockwood, Attorneys for The Pullman Company.

[File endorsement omitted.]

[fol. 71] IN UNITED STATES DISTRICT COURT

ANSWER OF THE PULLMAN COMPANY TO THE SECOND AMENDED
COMPLAINT—Filed February 25, 1936

Comes Now The Pullman Company, one of the defendants hereinabove named, and for its separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication, if such be intended, therein, that it owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph mentioned, or elsewhere, or at all, and specifically denies that this defendant is a common carrier of passengers for hire, or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the [fol. 72] right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935," and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof.

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that it has not sufficient information or belief to enable it to answer the allegations thereof and basing its denial thereon, denies the same.

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that it has not sufficient information or belief to enable it to answer the allegations thereof and basing its denial thereon, denies the same.

[fol. 73]

VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that it have and recover its necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Dated, February 24th, 1936.

Verified.

[File endorsement omitted.]

[fol. 74] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

REQUEST FOR TRANSCRIPT—Filed March 6, 1936

To L. E. Lampton, County Clerk, and Clerk of the Above Entitled Court:

You are hereby requested to prepare a transcript of the hereinafter specifically described documents in the above entitled action, to-wit:

1. Stipulation between counsel for plaintiffs and counsel for defendant, Southern Pacific Company, a corporation, that Mrs. Garnett V. Jenkins, Administratrix, be substituted as party plaintiff in the above entitled cause.

[fol. 75] 2. Answer of the defendant, Southern Pacific Company.

3. Amendment to the complaint, inserting the true name of John Doe One as Edward E. Myers.

4. Affidavit of Service on A. J. Kash.

5. Certification of service by Sheriff of San Francisco on The Pullman Company.

6. Original Summons.

7. Answer of Fred M. Dolsen, sued herein as John Doe One.

Dated This 5th day of March, 1936.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 76] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

SUMMONS—Filed June 27, 1936

The People of the State of California Send Greetings to Southern Pacific Company, a Corporation; The Pullman Company, a Corporation; A. J. Kash, B. A. Hatch, John Doe One and John Doe Two, Defendant-:

You are directed to appear in an action brought against you by the above named plaintiffs in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 27 day of September, 1935.

L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by W. L. Greene, Deputy.
(Seal Superior Court, Los Angeles County.)

Notice

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

[fol. 78] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Daniel W. May being sworn, says: I am and was at the time of the service of the summons herein, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles, —, State of California, —, at the address and the time set opposite their names, a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Name of Defendants Served Edward E. Myers, sued herein as John Doe One City and Street Address 649 East 56th Street Los Angeles, Calif. Date of Service January 14, 1936.

My fees for services are, \$.50 for 10 miles actually traveled at 25 cents per mile, \$2.50. Total, \$3.00.

(Signed) Daniel W. May.

Subscribed and sworn to before me this 14th day of January, 1936. L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by — — —, Deputy. L. H. Phillips, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[Sheriff's Office. Received via U. S. Mail Oct. 21, 1935. At 9:25 o'clock A. M., San Francisco, California.]

[fol. 79] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Daniel W. May being sworn, says: I am and was at the time of the service of the summons herein, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles,

—, State of California, — at the address and the time set opposite their names, a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Name of Defendants Served Fred Dolsen, sued herein as John Doe Two. City and Street Address Southern Pacific Railway Station, Fifth and Central Streets, Los Angeles, California. Date of Service Jan. 22, 1936.

My fees for services are \$.50 for 7 miles actually traveled at 25 cents per mile, \$1.75. Total, \$2.25.

(Signed) Daniel W. May.

Subscribed and sworn to before me this 23rd day of January, 1936. L. E. Lampton, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, by — — —, Deputy. L. H. Phillips, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[File endorsement omitted.]

[fol. 80] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF EDWARD E. MYERS, SUED HEREIN AS JOHN DOE ONE, TO THE SECOND AMENDED COMPLAINT—Filed March 17, 1936

Comes Now Edward E. Myers, sued herein as John Doe One, and for his separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication therein, if such be intended, that the Pullman Company, one of the defendants herein, owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph [fol. 81] mentioned, or elsewhere, or at all, and specifically

denies that said defendant is a common carrier of passengers for hire or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said defendant, A. J. Kash, was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935", and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof.

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

[fol. 82]

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that he have and recover his necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Attorneys for Defendant Edward E. Myers (sued herein as John Doe One).

Dated March 17th, 1936.

Verified.

[File endorsement omitted.]

[fol. 83] IN UNITED STATES DISTRICT COURT

ANSWER OF H. J. HATCH TO THE SECOND AMENDED COMPLAINT—Filed March 17, 1936

Comes Now H. J. Hatch, one of the defendants herein-above named, and for his separate answer to the Second Amended Complaint on file herein, shows:

I

Answering Paragraph V of the first alleged cause of action in said complaint set forth, this defendant denies the implication therein, if such be intended, that the Pullman Company, one of the defendants herein, owns, operates or maintains sleeping cars or sleeping car equipment for the purpose of carrying passengers as a common carrier for hire in or between any of the states in said paragraph mentioned, or elsewhere, or at all, and specifically denies that said defendant is a common carrier of passengers for hire or otherwise.

II

Denies the allegation in Paragraph VIII of the first alleged cause of action in said complaint "that just as said

defendant, A. J. Kash. was being taken from said train on said 29th day of March, 1935, at or about the hour of 10:30 o'clock P. M. of said day by the police officers at Ventura, California, he, the said A. J. Kash, struck the [fol. 84] said Robert L. Jenkins, Deceased, a terrific blow on his head, which did injure the said Robert L. Jenkins, Deceased, and did affect his brain, causing hemorrhage of the right frontal lobe of brain, with subdural hemorrhage, which hemorrhage took place in the front part of the brain near the mid-line and as a result thereof, he died on April 19th, 1935," and denies specifically that said A. J. Kash struck said Robert L. Jenkins, Deceased, a terrific or other blow on his head or that said Robert L. Jenkins, Deceased, was injured or that his brain was affected by any blow at the time and place mentioned, or that he died as the result of any such alleged blow.

III

Answering Paragraph IX of said alleged first cause of action, this defendant denies each and every, all and singular, the allegations thereof

IV

Denies Paragraph X of said alleged first cause of action and each and every, all and singular, the allegations thereof.

V

Answering Paragraph XI of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

[fol. 85]

VI

Answering Paragraph XII of said alleged first cause of action this defendant alleges that he has not sufficient information or belief to enable him to answer the allegations thereof and basing his denial thereon, denies the same.

VII

Denies Paragraph XIV of said alleged first cause of action and each and every, all and singular the allegations thereof.

Wherefore this defendant prays that plaintiffs take nothing by their said action and that he have and recover his necessary costs and disbursements herein incurred.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated March 17th, 1936.

Verified.

[File endorsement omitted.]

[fol. 86] IN SUPERIOR COURT OF LOS ANGELES COUNTY

[Title omitted]

ORDER AS TO RECORD—Filed March 6, 1936

Pursuant to the stipulation between counsel for plaintiffs and the defendants in the above entitled cause, and good cause appearing therefor,

It is Hereby Ordered that those records which were not heretofore transcribed on removal of the above entitled cause to the United States District Court, Southern District of California, Central Division, be transcribed and removed to the District Court of the United States, Southern District of California, Central Division and the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles is hereby ordered to prepare a transcript of the following documents for removal to the Federal Court as aforesaid, to-wit:

1. Stipulation between counsel for plaintiffs and counsel for defendant, Southern Pacific Company, a corporation, that Mrs. Garnett V. Jenkins, Administratrix, be substituted as party plaintiff in the above entitled cause.
2. Answer of the defendant, Southern Pacific Company.
3. Amendment to the complaint, inserting the true name of John Doe One as Edward E. Myers.
4. Affidavit of Service on A. J. Kash.
5. Certification of service by Sheriff of San Francisco on The Pullman Company.
6. Original Summons.
7. Answer of Fred M. Dolsen, sued herein as John Doe One.

The Clerk of this Court is hereby directed to make a certified copy of the record hereinabove set forth to be transcribed in said action for entry in said District Court of the United States, Southern District of California, Central Division.

Done in open court this 6th day of March, 1936.

K. K.

Edmonds Presiding Judge. (Seal)

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 88] IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANTS SOUTHERN PACIFIC COMPANY AND
FRED M. DOLSEN, SUED HEREIN AS JOHN DOE TWO, TO
PLAINTIFFS' SECOND AMENDED COMPLAINT—Filed December 4, 1936

Defendants 'Southern Pacific Company, a corporation, and Fred M. Dolsen, sued herein as John Doe Two, answering plaintiffs' second amended complaint for themselves alone, and not for any other defendant, admit, deny and allege as follows:

I

Admit the allegations of paragraph I.

II

Admit the allegations of paragraph II.

III

Admit the allegations of paragraph III.

IV

Answering paragraph IV, admit that Southern Pacific Company was and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and doing business in the City of Los Angeles, State of California, and is authorized to do business in the State of California, and is the owner and operator of railroad tracks and equipment. Admit said company operated

trains through California, Nevada, Arizona and other states, and that said equipment and passenger trains are indiscriminately used by defendant for interstate and intrastate commerce, and admit that at all times mentioned in plaintiffs' complaint, defendant engaged as a common carrier and engaged in interstate commerce between the States [fol. 89] of California, Nevada, Arizona and other states, and was so engaged in interstate commerce as aforesaid on the 29th day of March, 1935.

Further answering said paragraph these defendants deny each and every allegation therein contained, both generally and specially, except as heretofore expressly admitted.

V

Answering paragraph VI, these defendants admit the allegations contained therein.

VI

Answering paragraph VII, these defendants have not sufficient information or belief to enable them to answer, and basing their denial on that ground, denies each and every allegation therein contained, both generally and specially, except that defendants admit that defendant A. J. Kash at all times mentioned was a passenger on said Pullman car on the 29th day of March, 1935.

VII

Admit the allegations of paragraph VIII.

VIII

Answering paragraph IX, these defendants admit that in the event persons are disorderly in and about said passenger coaches, that the conductor or other officer in charge shall eject said passenger or passengers from the train, and are permitted to call to their assistance duly constituted peace officers of the State, City or County of or in California; further admit that the employees of defendant Southern Pacific Company are instructed to preserve order in and about stations and station platforms. [fol. 90] Further answering said paragraph, these defendants deny each and every allegation therein contained, both generally and specially, except as heretofore expressly admitted.

IX

Answering paragraph X, these defendants deny each and every allegation therein contained, both generally and specially.

X

Admit the allegations contained in paragraph XI, excepting these defendants deny that Robert L. Jenkins had a life expectancy of 70.08 years.

XI

Answering paragraph XII, these defendants have not sufficient information or belief to enable them to answer, and basing their denial on that ground deny each and every allegation therein contained, both generally and specially.

XII

Answering paragraph XIII, these defendants deny each and every allegation therein contained, both generally and specially.

XIII

Answering paragraph XIV, these defendants deny each and every allegation therein contained, both generally and specially, and further deny said plaintiffs have been damaged in the sum of \$50,000.00, or any other sum, or at all.

XIV

Admit the allegations of paragraph XV.

[fol. 91] Defendants Southern Pacific Company and Fred M. Dolsen, voluntarily appearing as to the second cause of action in said complaint, for the sole purpose of making certain denials with respect to particular allegations therein admit, deny and allege as follows:

I

Admit the allegations of paragraph I.

II

Admit the allegations of paragraph II.

III

Admit the allegations of paragraph III.

IV

Answering paragraph IV, these defendants deny each and every allegation therein contained, both generally and specially, excepting admit that while on said train defendant A. J. Kash, while in said Pullman car, did loudly, maliciously, and with unusual tone of voice and with tumult-ous conduct, threaten, quarrel and challenge to fight passengers on said train, using profane and vile language in the presence of other passengers, including women passengers; further admit that the said conductor, for purposes of ejecting defendant A. J. Kash, called police officers at Ventura, California; that upon arriving in Ventura, the said A. J. Kash was placed under arrest by the [fol. 92] said officer. Further admit that the said Robert L. Jenkins died on the 19th of April, 1935.

V

Admit the allegations of paragraph V.

VI

Answering paragraph VI, these defendants deny each and every allegation therein contained, both generally and specially, and further deny said plaintiffs have been damaged in the sum of \$50,000.00, or any other sum, or at all.

Further answering, and as a first separate and affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof, these defendants allege as follows:

I

That the rights of the decedent, Robert L. Jenkins, and defendant Southern Pacific Company, at the time of said alleged injury, were governed by the provisions of the Federal Employers Liability Act, and that said alleged injury, if any, arose in the course of decedent's employment, and from the ordinary risks and hazards attendant upon such employment, and of extraordinary risks and hazards which arose during the course of the employment,

of which decedent knew, or in the exercise of ordinary care should have known.

[fol. 93] For a further, separate and second affirmative defense to all and singular the purported causes of action of the plaintiff's second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, decedent himself was engaged in the employment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that the rights and liabilities of decedent and said defendant at said times were and are governed by the Federal Employers Liability Act; that said accident, if any, which occurred, and said injury, if any, which was sustained by said decedent as a result thereof, arose directly from and out of the risks, dangers and hazards ordinarily incident to and attendant with and upon the employment of said decedent, and that said risks, hazards and dangers were ordinarily incident to and a part of said defendant Southern Pacific Company's employment, and were therefore assumed by him while engaged in the service of said defendant.

For a further, separate and third affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, said decedent himself was engaged in the employment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that the rights and liabilities of decedent and said defendant were and are governed by the Federal Employers Liability Act; that the negligence, if any, on the part of said defendant which resulted in injuries, if any, to said decedent, at all times was open and obvious, and was fully known and appreciated by said decedent, and as a result decedent's said knowledge and appreciation of said danger,

risk and hazard attendant to his said employment, in the face of said dangers, risks and hazards, said decedent thereby assumed the dangers, risks and hazards of the said negligence of said defendant, if any, and of the said injury, if any, as a result thereof and as a result of his said employment.

For a further, separate and fourth affirmative defense to all and singular the purported causes of action of the plaintiffs' second amended complaint, and each and every part thereof these defendants allege as follows:

I

That at all times mentioned in plaintiffs' second amended complaint, decedent himself was engaged in the employment of defendant Southern Pacific Company as a conductor on cars moving in interstate commerce, and that said rights and liabilities of decedent and said defendant [fol. 95] at said times were and are governed by the Federal Employers Liability Act; that the injuries of said decedent, if any, arose directly out of and were caused from risks and dangers incident to said employment, which decedent then and there assumed under and by virtue of said Federal Employers Liability Act, whether said risks and dangers were ordinary risks and dangers, ordinarily incident to his employment, or were extraordinary risks and dangers, of which said decedent knew, or in the exercise of reasonable care should have known, but either of which he then and there assumed at the time he entered into the employment of said defendant.

Wherefore, these answering defendants pray that plaintiffs take nothing by their second amended complaint; that they be dismissed hence with their costs; for such other and further relief as the court shall deem meet in the premises.

W. I. Gilbert, Attorney for said Answering Defts.

Verified.

[File endorsement omitted.]

[fol. 96] IN UNITED STATES DISTRICT COURT

DISMISSAL—Filed December 28, 1936

To the Clerk of the United States District Court, Southern District of California, Central Division:

You will enter the dismissal of the above entitled action as against the defendants, Southern Pacific Company and Fred M. Dolsen.

Dated this 24th day of December, 1936.

L. H. Phillips, Attorney for Plaintiffs.

Approved. W. I. Gilbert, by Thos. P. Cruce, Atty. for Sou. Pac. Co.

It is so ordered Dec. 28, 1936. Leon R. Yankwich, Judge.

Judgment entered and recorded Dec. 28, 1936. R. S. Zimmerman, Clerk, by Louis J. Somers, Deputy Clerk.

(No. 7421 Y Jenkins vs. Pulman Co. et al. Defts. Exhibit No. B on plea in Bar. Filed 12/29, 1936. R. S. Zimmerman, Clerk, by L. J. S., Deputy Clerk.)

[File endorsement omitted.]

[fol. 97] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF DEFENDANT A. J. KASH—Filed December 29, 1936

Comes Now A. J. Kash, one of the defendants herein above named, and, by leave of court duly had, files this his supplemental answer to the complaint on file herein and alleges:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the defendants Southern Pacific Company and Fred M. Dolsen have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendants has been compromised and settled and said defendants released from all

claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

III

That this action has been voluntarily dismissed as to defendants Southern Pacific Company and Fred M. Dolson [fol. 98] by plaintiffs for a valuable consideration, to-wit, the sum of Twenty-five Hundred Dollars (\$2500.00), and said dismissal has released all defendants herein.

IV

That plaintiffs have been paid the sum of Twenty-five Hundred Dollars (\$2500.00) as compensation for the death of Robert W. Jenkins by defendants Southern Pacific Company and Dolson and in consideration of said payment plaintiffs voluntarily dismissed this action.

Wherefore, this defendant prays that this action be dismissed and that this defendant have judgment for his costs.

Livingston & Livingston, Attorneys for Defendant
A. J. Kash.

Verified.

[File endorsement omitted.]

[fol. 99] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF THE PULLMAN COMPANY—Filed
Dec. 29, 1936

Comes Now The Pullman Company, one of the defendants hereinabove named, and, by leave of court duly had, files this its supplemental answer to the complaint on file herein and by it shows:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the

Southern Pacific Company, one of the defendants herein, have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendant has been compromised and settled and said defendant released from all claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

Wherefore this defendant prays that said action be hence dismissed.

Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Dated, December 28th, 1936.

Verified.

[File endorsement omitted.]

[fol. 100] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL ANSWER OF H. J. HATCH—Filed Dec. 29, 1936

Comes Now H. J. Hatch, one of the defendants herein-above named, and, by leave of court duly had, files this his supplemental answer to the complaint on file herein and by it shows:

I

That this defendant is informed and believes and on such information and belief alleges that the plaintiffs and the Southern Pacific Company, one of the defendants herein, have heretofore made and entered into an agreement under the terms whereof the cause of action pleaded in said complaint against said defendant has been compromised and settled and said defendant released from all claims arising out of the matters and things set forth in said complaint.

II

That the aforementioned settlement and release constitute and are a full release of this defendant and a complete settlement of the cause of action in said complaint alleged.

Wherefore this defendant prays that said action be hence dismissed.

Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch.

Dated December 28, 1936.

Verified.

[File endorsement omitted.]

[fol. 101] IN UNITED STATES DISTRICT COURT

WAIVER OF JURY BY PLAINTIFF—Filed December 7, 1936

Come Now the plaintiffs, by their counsel, L. H. Phillips, and waive a jury trial in the above entitled cause and request that said cause proceed to trial before the Honorable Court without a jury.

Dated this 3rd day of December, 1936.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 102] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—December 29, 1936

This cause coming on for trial; L. H. Phillips, Esq., appearing for the plaintiffs; H. K. Lockwood and M. W. Reed, Esqs., appearing for defendants The Pullman Company, H. J. Hatch and defendant Myers; Lawrence Livingston, Esq., appearing for defendant A. J. Kash; R. W. Jones being present as official court reporter;

M. W. Reed, Esq., moves for leave on behalf of The Pullman Company and H. J. Hatch to file a supplemental answer, to which plaintiffs object; motion is granted and objection of plaintiff overruled; exception noted. Supplemental Answers are ordered filed with leave to Mr. Livingston to file supplemental answer after noon recess.

M. W. Reed, Esq., for defendants Pullman Co. and Hatch and Myers states willing to waive a jury and at this time to present matters alluded to in the supplemental answers and waives jury for said defendants; Mr. Livingston also waives jury on behalf of defendant Kash. Jury is excused until further notice.

[fol. 103] IN UNITED STATES DISTRICT COURT

ORDER RE ANSWERS—Filed January 22, 1937

Good Cause Appearing Therefor, it is hereby Ordered that the supplemental answer of H. J. Hatch, one of the defendants in the above entitled action, to the complaint therein, be deemed to be and be, and stand for and as the supplemental answer also of Edward E. Meyers, one of the defendants in said action.

It is Further Ordered that this Order be entered nunc pro tunc and appear of record as of the 29th day of December, 1936, that being the date the said supplemental answer of said H. J. Hatch was filed, exception noted to plaintiffs.

Dated, this 22nd day of January, 1937.

Leon R. Yankwich, Judge.

[File endorsement omitted.]

[fol. 104] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 22, 1937

This Cause came on regularly for trial on the 29th day of December, 1936, before the Court, sitting without a jury, a jury having been waived in open Court by all parties to this action immediately prior to the commencement of the

trial. Plaintiffs appeared herein by L. H. Phillips, Esq., their attorney, defendant, The Pullman Company, appeared herein by its Attorneys Robert Brennan, M. W. Reed, Leo E. Sievert and H. K. Lockwood, and defendants H. J. Hatch and Edward E. Meyers (sued herein as John Doe One) appeared by Robert Brennan and M. W. Reed, Esq., their attorneys, and defendant A. J. Kash appeared by Messrs. Livingston & Livingston and Lawrence Livingston, Esq., his attorneys; and this action having been dismissed by plaintiffs as against defendants Southern Pacific Company and Fred M. Dolsen (sued herein as John Doe Two), and defendants The Pullman Company, H. J. Hatch and A. J. Kash having moved in open court for leave to file supplemental answers herein and said motions having been granted, and supplemental answers having been filed herein by said defendants The Pullman Company, H. J. Hatch and A. J. Kash, and the Court having made an order nunc pro tunc herein that the supplemental answer of defendant, H. J. Hatch be deemed to be and be and stand as and for the supplemental answer also of defendant Edward E. [fol. 105] Meyers, and as more fully appears from said supplemental answers said answers have tendered certain pleas in bar which are hereinafter more fully referred to, and each of the parties having stipulated in open court that said pleas in bar might be tried forthwith and prior to the trial of this action upon its merits, and said pleas in bar having accordingly been duly tried and evidence having been introduced relevant, competent and material to said pleas in bar, and the Court having considered the same, now finds as follows:

(1) That the first cause of action set forth in the complaint herein is stated jointly against all the defendants as joint tort-feasors.

(2) That the second cause of action therein stated is against defendant A. J. Kash alone, but that the two said causes of action against said A. J. Kash are the same.

(3) That subsequent to the commencement of this action and prior to the trial thereof, plaintiffs and defendants Southern Pacific Company and Fred M. Dolsen made and entered into an agreement under the terms whereof the cause of action pleaded in the complaint herein against said

defendants Southern Pacific Company and Fred M. Dolsen was compromised and settled and said defendants were released from all claims arising out of the matters and things set forth in said complaint.

(4) That subsequent to the commencement of this action and prior to the trial thereof, the Superior Court of the State of California, in and for the County of Los Angeles, by order duly made on the Petition of Plaintiff Garnett V. [fol. 106] Jenkins, Administratrix of the Estate of Robert L. Jenkins, Deceased, in the matter of the estate of Robert L. Jenkins, Deceased, Probate No. 154390, confirmed and approved said compromise and settlement and ordered that she be permitted to dismiss said cause of action as against defendant Southern Pacific Company.

(5) That subsequent to the commencement of this action and prior to the trial thereof, this action was voluntarily dismissed by plaintiffs as to defendants Southern Pacific Company and Fred M. Dolsen for a valuable consideration paid to plaintiffs by said defendants, to wit: the sum of Twenty-Five Hundred Dollars (\$2500.00), the dismissal being signed by the Attorney for the plaintiffs, approved by the attorney for the said two defendants and ordered filed by the Court.

(6) That plaintiffs have been paid the said sum of Twenty-Five Hundred Dollars (\$2500.00) as compensation for the death of Robert L. Jenkins by defendants Southern Pacific Company and Fred M. Dolsen and in consideration of said payment plaintiffs have voluntarily dismissed this action and such dismissal has released said defendants Southern Pacific Company and Fred M. Dolsen from any liability or responsibility on account of any of the matters or things set forth in the complaint herein.

(7) That said compromise and settlement and the said dismissal, and the payment of a substantial sum of money, to wit: Twenty-Five Hundred Dollars (\$2500.00), amounted to a settlement of the entire controversy and the release of the causes of action as to all the defendants.

[fol. 107] (8) That no evidence has been offered or received herein with reference to any of the matters or things alleged in the complaint.

And from the foregoing Findings of Fact the Court makes the following

Conclusions of Law

(1) That none of the issues tendered by the complaint herein should be tried.

(2) That the pleas in bar of said defendants should be and the same are hereby sustained.

(3) That this action should be dismissed upon its merits as to all defendants and that defendants The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash are entitled to judgment in their favor and against plaintiffs for their costs herein incurred.

Let judgment be entered accordingly.

Dated, January 22, 1937.

Leon R. Yankwich, United States District Judge.

Approved as to form, as provided in Rule 44. L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 108] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 7421-Y. Civil

MRS. GARNETT V. JENKINS and ROBERT W. JENKINS, by
Mrs. Garnett V. Jenkins, his Guardian ad Litem, Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation; THE PULLMAN COMPANY, a Corporation, A. J. Kash, H. J. Hatch, Edward E. Meyers, John Doe One and John Doe Two, Defendants

JUDGMENT—Filed February 5, 1937

On the 22nd day of January, 1937, the Court filed herein its "Findings of Fact and Conclusions of Law"; and it appearing therefrom that this action has heretofore been

settled, compromised, and dismissed as to the defendants, Southern Pacific Company, a corporation, and Fred M. [fol. 109] Dolsen (sued herein as John Doe Two); and it further appearing therefrom, that this action is dismissed upon its merits as to all defendants, and that the defendants The Pullman Co., H. J. Hatch, Edward E. Meyers and A. J. Kash are entitled to judgment in their favor and against plaintiff for their costs herein incurred; and that judgment be entered accordingly;

Now, Therefore, pursuant to the premises aforesaid, it is Ordered, Adjudged and Decreed, that this action be, and the same hereby is dismissed as to the defendants, The Pullman Co., H. J. Hatch, Edward E. Meyers and A. J. Kash, and that the said defendants do have and recover of and from the plaintiffs herein Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem, their costs incurred herein, taxed at \$56.05.

Judgment entered and recorded January 22nd, 1937.

R. S. Zimmerman, Clerk, by Theodore Hocke, Deputy Clerk.

[File endorsement omitted.]

[fol. 110] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO PROPOSED FINDINGS AND PROPOSED AMENDMENTS BY THE PLAINTIFFS—Filed January 27, 1937

Objections Overruled. Exception. L. R. Y.

Come Now the plaintiffs and objection to the proposed Findings submitted by the defendants, and respectfully move the court to amend said Findings in the following particulars, to-wit:

On Page 2, at line 11, after the word "and", insert "documentary".

On Page 2, at line 24, after the word "whereof", strike the following: "the cause of action pleaded in the complaint herein against said defendants, Southern Pacific Company and Fred M. Dolsen was compromised and settled and said defendants were released from all claims arising out of the matters and things set forth in said complaint"; and insert in lieu thereof, the following: plaintiffs agree to refrain

from instituting, pressing or in any way aiding any claims, demand, action, or causes of actions for damages against the defendants, Southern Pacific Company and Fred M. Dolsen.

[fol. 111] On Page 3, at line 4, after the word "said", strike "compromise and settlement", and insert in lieu thereof, "covenant not to sue".

On Page 3, at line 30, after the word "evidence", strike the following, "has been offered or", and in lieu thereof insert the word "was".

The plaintiffs further enter an objection to the Findings of Fact and Conclusions of Law as proposed by the defendants.

Dated January 27th, 1937.

Respectfully submitted, L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 112] IN UNITED STATES DISTRICT COURT

OBJECTIONS TO DEFENDANTS' COSTS AND DISBURSEMENTS AND
MOTION TO TAX COSTS—Filed January 27, 1937

Comes Now the plaintiffs and hereby move the Honorable Court to tax the costs in the above entitled action, and to strike out of the defendants' disbursements and costs filed herein, the following items, to-wit:

1. Premium on Surety Bond \$10.00, on the ground that it is not properly chargeable as a cost in said action.

2. Strike out the following items, to-wit: Witness fees—R. H. Higgins, \$2.50; S. A. Barnes, \$2.50; Charles Scurry \$2.50 and M. K. Sheehan \$2.50 on the ground that said items are not properly chargeable as costs in said action, in that said witnesses were not called to testify, and further that the defendants moved the Honorable Court for leave to file supplemental answers in said cause and motions tendering certain pleas in bar, and moved the Honorable Court to determine said pleas in bar and prior to the trial of said cause upon its merits, and that said pleas in bar having been accordingly tried, and therefore said cause not being at issue, and after argument of counsel, the Court granted said mo-

tions and permitted the filing of said supplemental answers and sustained said pleas in bar, and that said cause was not tried upon its merits.

Dated January 27, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 113] IN UNITED STATES DISTRICT COURT

AFFIDAVIT SUPPORTING OBJECTIONS TO DEFENDANTS COSTS AND DISBURSEMENTS AND MOTION TO TAX COSTS—Filed January 27, 1937

STATE OF CALIFORNIA,

County of Los Angeles, ss:

L. H. Phillips, being duly sworn deposes and says: That he is the attorney of record for the plaintiffs, and he was present in court on the 29th day of December, 1936, in the Court room of the Honorable Leon R. Yankwich, being the time and place where said cause was called for trial. That upon counsel answering to the call of Calendar, they were ready for trial, but defendants, The Pullman Company, H. J. Hatch and Edward E. Meyers moved the Honorable Court for permission for leave to file supplemental answers in said cause and motions tendering certain pleas in bar, and moved the Honorable Court that said pleas in bar be determined first before the trial of said cause upon its merits. That no witnesses on behalf of said defendants were called to testify in behalf and in support of said motions, and that after argument of counsel, the court granted to said defendants, aforesaid, said motions and permitted said supplemental answers to be filed, and did sustain the motions and pleas in bar made by said defendants, as aforesaid, and said cause was dismissed as to said defendants without said cause being tried upon its merits or calling any witnesses.

L. H. Phillips.

Subscribed and sworn to before me this 27th day of January, 1937. M. B. Liggett, Notary Public in and for said County and State. (Seal.)

[File endorsement omitted.]

[fol. 115] IN UNITED STATES DISTRICT COURT

Engrossed Bill of Exceptions—Filed March 2, 1937

Be it Remembered that the above entitled case came on regularly for trial on Tuesday, the 29th day of December, 1936, at the hour of 10:00 o'clock A. M. of said day before the Honorable Leon R. Yankwich, Judge Presiding, in the District Court of the United States, Southern District of California, Central Division, sitting without a jury.

Plaintiffs, Mrs. Garnett V. Jenkins and Mrs. Garnett V. Jenkins as Guardian Ad Litem of Robert W. Jenkins, appeared in person and by their attorney, L. H. Phillips, Esquire; the defendants, H. J. Hatch and Edward E. Myers, appeared by their attorneys, Robert Brennan, Esquire and M. W. Reed, Esquire; the defendant, The Pullman Company, appeared by its attorneys, Robert Brennan, Esquire, M. W. Reed, Esquire, Leo E. Sievert, Esquire, and H. K. Lockwood, Esquire; and the defendant, A. J. Kash, appeared in person and by his attorney, Lawrence Livingston, Esquire of Livingston & Livingston.

Thereupon, the following proceedings and none other were had and the following documentary evidence and none other was received, to-wit:

Before any evidence was offered the defendants, The Pullman Company, H. J. Hatch, Edward E. Myers and A. J. Kash, each, with leave of Court first had, filed supplemental answers in which it was alleged that the plaintiffs and the defendants, Southern Pacific Company and Fred M. Dolsen, had therefore entered into an agreement whereby the cause [fol. 116] of action pleaded in the complaint had been compromised and settled and the last named defendants released from all claims arising out of the matters set forth in the complaint; that the plaintiffs received the sum of Twenty-five Hundred Dollars (\$2500.00) as compensation for the death of Robert W. Jenkins, and in consideration of such sum dismissed the action voluntarily. Said supplemental answers further pleaded the settlement as a full release of the cause of action in the complaint.

Leave of Court was duly given for the filing of the supplemental answers.

Thereupon the respective counsel for plaintiffs and defendants stipulated and agreed that the Court hear the evidence to be offered in support of the defendants' pleas in bar raised by their supplemental answers and that the ques-

tion of law raised thereby be determined by the Court before the taking of any further testimony on the other issues raised by the pleadings.

The defendants thereupon offered in evidence a certified copy of the following instrument:

EXHIBIT "A"

"Covenant Not to Sue

"The undersigned, Mrs. Garnett V. Jenkins, and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, of the City of Los Angeles, County of Los Angeles, State of California, for our heirs, executors, administrators and assigns, in consideration of Twenty-Five Hundred Dollars (\$2500.00) Paid by Southern Pacific Company, a corporation, the receipt of which is hereby acknowledged, do by [fol. 117] this instrument covenant with the said Southern Pacific Company, a corporation, and Fred M. Dolsen, forever to refrain from instituting, pressing or in any way aiding any claim, demand, action, or cause of action for damages, costs, loss of service, expense or compensation for, on account of, or in any way growing out of, or hereafter to grow out of, the injury or death of Robert L. Jenkins, deceased, husband of the said Mrs. Garnett V. Jenkins, and father of the said Robert W. Jenkins, occurring on the 29th day of March, 1935, or his said death on the 19th day of April, 1935 while in the employ of the said Southern Pacific Company, a corporation, as passenger conductor or otherwise, and running between various points and particularly on the 29th day of March, 1935 between Los Angeles, California and San Luis Obispo, California in which the said Robert L. Jenkins claimed to have received a blow on the head from one, A. J. Kash, and it is alleged that the said Robert L. Jenkins, deceased, died as a result of said blow by the said A. J. Kash on the 29th day of March, 1935, or from any other injury or cause while in the employ of Southern Pacific Company, a corporation, or otherwise, which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his

guardian ad litem, plaintiff, vs. Southern Pacific Company, a corporation, et al., No. 7421-Y, or from any cause or causes whether set forth in said complaint as aforesaid or otherwise, or at any time from the beginning of the world to the date of this instrument, reserving to the undersigned all rights that they, or either of them, may now have or hereafter have against any other person or persons, firms or corporations because of the death of the said Robert L. Jenkins, deceased.

"It is further agreed that the undersigned, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named, and it is further understood that said Southern Pacific Company, a corporation, does not in any manner or to any extent admit any liability or responsibility for the above claimed damages, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph herein specified.

"In Witness Whereof, the undersigned have hereunto set their hands this 21st day of December, 1936.

"Mrs. Garnett V. Jenkins and Robert W. Jenkins, by
Mrs. Garnett V. Jenkins, his Guardian ad Litem.

"STATE OF CALIFORNIA,

County of Los Angeles, ss:

"On This 21st day of December, A. D., 1936, before me, L. H. Phillips, a Notary Public in and for said County and State, personally appeared Mrs. Garnett V. Jenkins, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

[fol. 119] "In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

"L. H. Phillips, Notary Public in and for said County and State. (Seal.)"

The defendants thereupon offered in evidence a certified copy of the following instrument:

**"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF LOS ANGELES**

"No. 154390

"In the Matter of the Estate of ROBERT L. JENKINS, Deceased

**"Petition for Confirmation of Administratrix's Covenant
Not to Sue**

**"Comes Now Mrs. Garnett V. Jenkins, Administratrix of
the Estate of Robert L. Jenkins, Deceased, and respectfully
shows to the court as follows:**

I

**"That on the 10th day of December, 1935 your petitioner
was duly appointed Administratrix of the Estate of Robert
L. Jenkins, Deceased, by the Superior Court of the State of
California in and for the County of Los Angeles and has
ever since been the duly appointed, qualified and acting
Administratrix of said estate.**

[Vol. 120]

II

**"That your Administratrix filed an action against the
Southern Pacific Company, et al., in the above entitled court
on the 27th day of September, 1935 predicated upon an in-
jury claimed to have been received by her husband while a
railroad conductor on the train of the defendant, Southern
Pacific Company, caused by a passenger on said train who
was drunk and disorderly and struck the deceased, from
which your petitioner claimed the deceased passed away on
the 19th day of April, 1935; that said cause was removed to
the District Court of the United States, Southern District
of California, Central Division, upon application of the de-
fendants and is now pending in said District Court of the
United States and numbered 7421-Y.**

III

**"That your petitioner did on the 21st day of December,
1936 enter into a Covenant Not to Sue with said Southern
Pacific Company, defendant, a copy of which is hereto at-**

tached and made a part of this petition as if set out at length herein, for a consideration of Twenty-Five Hundred Dollars (\$2500.00); that your petitioner is advised and so believes that there is a question as to whether or not recovery could be had against the Southern Pacific Company, and therefore your petitioner verily believes that if a recovery could not be had the estate would be put to great expense in the trial of said cause against said Southern Pacific Company and respectfully requests the court that said Covenant Not to Sue entered into between said defendant, Southern Pacific Company, and your petitioner be confirmed.

[fol. 121] "Wherefore your petitioner prays that the court make an order confirming said Covenant Not to Sue and permitting the petitioner to dismiss said cause as against the Southern Pacific Company.

"Mrs. Garnett V. Jenkins, Administratrix. L. H. Phillips, Attorney for Administratrix.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

"Mrs. Garnett V. Jenkins, being first duly sworn, deposes and says: That she is the petitioner in the above entitled matter; that she has read the foregoing petition and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

"Mrs. Garnett V. Jenkins.

Subscribed and sworn to before me this 23rd day of December, 1936. L. H. Phillips, Notary Public in and for Said County and State."

[fol. 122] The defendants thereupon offered in evidence a certified copy of the following instrument:

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 154390

In the Matter of the Estate of ROBERT L. JENKINS, Deceased

Order Confirming Covenant Not to Sue

"Upon reading and filing the annexed petition praying for confirmation of the Covenant Not to Sue entered into

by and between the Administratrix of the above entitled estate, Mrs. Garnett V. Jenkins, and Southern Pacific Company, and it appearing to the court that it will be for the benefit of the estate to confirm said Covenant Not to Sue and to permit said Administratrix to dismiss said cause of action as against the Southern Pacific Company, a corporation.

"It is Hereby Ordered that the Covenant Not to Sue entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be permitted to dismiss said cause of action as against Southern Pacific Company, a corporation.

"Done in open court this 23rd day of December, 1936.

"Elliot Craig, Judge of the Above Entitled Court."

[fol. 123] Which said three foregoing instruments were duly admitted in evidence and together marked "Exhibit A".

The defendants thereupon offered in evidence a dismissal of said action as against the defendants, Southern Pacific Company and Fred M. Dolsen, duly approved by the Court, and filed, and reading as follows:

EXHIBIT "B"

"IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 7421-Y

MRS. GARNETT V. JENKINS, et al., Plaintiffs,

VS.

SOUTHERN PACIFIC COMPANY, a Corporation, et al., Defendants

DISMISSAL

"To the Clerk of the United States District Court, Southern District of California, Central Division:

"You will enter the dismissal of the above entitled action as against the defendants, Southern Pacific Company and Fred M. Dolsen.

"Dated This 24th day of December, 1936.

"L. H. Phillips, Attorney for Plaintiffs."

[fol. 124] "It is so ordered:

"Leon R. Yankwich, Judge.

"Decree entered and recorded December 28, 1936.

"R. S. Zimmerman, Clerk, by Louis J. Somers,
Deputy Clerk."

Which said instrument was duly admitted in evidence as
"Exhibit B".

And the foregoing includes and contains all the proceedings had and all the evidence tendered and all the evidence received upon the trial of said cause and the matter was thereupon submitted to the Court for its decision.

RULING OF COURT

Thereupon, the Court made the following ruling:

"The plea in bar interposed by the defendants, and which by consent of counsel was tried ahead of the trial on the merits, will be sustained, and on the basis of the evidence as presented on the plea in bar, the action will be dismissed upon the ground that the plaintiffs before the trial of this case had settled the controversy and cause of action with two of the co-defendants, and two of the joint tort-feasors, and the settlement of the controversy and subsequent dismissal, together with all the other circumstances, as well as [fol. 125] the payment of a substantial sum of money, to-wit, \$2500.00, amounted to a release of the cause of action as to all of the defendants, and exception will be noted, and findings will be limited to the plea in bar."

To which plaintiffs duly excepted and still except.

That thereupon, and within the time allowed by law, the above entitled court did make and execute its written order extending time to plaintiffs to file their Engrossed Bill of Exceptions to and including the 8th day of February, 1937.

The plaintiffs present the foregoing as their Bill of Exceptions herein and pray that the same may be settled, allowed and certified as part of the record herein.

L. H. Phillips, Attorney for Plaintiffs.

The foregoing Bill of Exceptions was presented this 3rd day of March, 1937 to the said Honorable Leon R. Yankwich by the plaintiffs in accordance with orders of court heretofore entered pertaining thereto for the presenting, signing and filing of said Bill of Exceptions herein for the approval, signature and seal of said Honorable Leon R. Yankwich. Said Bill of Exceptions was delivered to counsel for defendants for examination as said counsel and the approval, signature and seal of the same was taken under advisement of said Court.

Leon R. Yankwich, Judge of United States District Court.

[fol. 126]

STIPULATION

It is hereby stipulated by and between counsel for plaintiffs and counsel for defendants in the above entitled action that the foregoing Bill of Exceptions is a true and correct copy in narrative form of all the evidence and exhibits offered.

Dated this 1st day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs. Robert Brennan, M. W. Reed, Attorneys for Defendant, H. J. Hatch and Edward E. Myers. Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company. Livingston & Livingston, Attorneys for Defendant, A. J. Kash.

[fol. 127] Received copy of the within Bill of Exceptions this 1st day of March, 1937.

Robert Brennan, M. W. Reed, Attorneys for Defendants, H. J. Hatch and Edward E. Myers. Robert Brennan, M. W. Reed, Leo E. Sievert, H. K. Lockwood, Attorneys for Defendant, The Pullman Company.

Rec'd Copy March 2, 1937.

Livingston & Livingston, by J. K. B., Attorneys for Defendant, A. J. Kash.

[File endorsement omitted.]

[fol. 128] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 19, 1937

To the Honorable Leon R. Yankwich, Judge of Said Court:

Come Now Mrs. Garnett V. Jenkins and Mrs. Garnett V. Jenkins, as Guardian Ad Litem of Robert W. Jenkins, by L. H. Phillips, Esquire, her attorney, and feeling themselves aggrieved by the final judgment of this court entered against them in favor of defendants on the 22nd day of January, 1937 hereby pray that an appeal may be allowed to the Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States, for the Southern District of California, Central Division, and in connection with this petition petitioners herewith present their Assignment of Errors.

Dated this 15th day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 129] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 19, 1937

And Now Comes plaintiffs by L. H. Phillips, Esquire, their attorney, and in connection with their petition for an appeal say that the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of plaintiffs, to-wit:

I

The court erred in denying plaintiffs' motion to remove the action to the Superior Court of the State of California in that the pleadings show that all defendants except one are residents of the State of California.

[fol. 130]

II

The court erred in ruling that the first and second count of plaintiffs' second amended complaint constituted together the same tort and were indivisible.

III

The court erred in ruling that the document entitled "Covenant Not to Sue" (Exhibit A) was a release.

IV

The court erred in its Findings of Fact and Conclusions of Law, to-wit:

(a) Page 2, line 11, in not inserting the word "documentary" before the word "evidence";

(b) Page 3, line 4, after the word "said", in refusing to strike "compromise and settlement" and inserting in lieu thereof "Covenant Not to Sue",

to which exception was duly noted by the court.

V

The court erred in overruling plaintiffs' objections to defendants' costs and disbursements and motion to tax costs in that certain witnesses' fees were not properly chargeable as costs in said action in that witnesses were not called to testify by reason of defendants' insistence in tendering the plea at bar.

By Reason Whereof plaintiffs pray that the aforesaid judgment may be reversed.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 131] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 30, 1937

Upon motion of L. H. Phillips, Esquire, attorney for plaintiffs, and upon filing a petition for an appeal and an assignment of errors,

It is Ordered that an appeal be and hereby is allowed to have reviewed by the United States Circuit Court of Appeals For the Ninth Circuit the judgment heretofore entered

herein, and that the amount of cost bond on said Assignment of Error be and hereby is fixed at \$250.00.

Dated this 30th day of March, 1937.

Leon R. Yankwich, District Judge.

[File endorsement omitted.]

[fol. 132] IN UNITED STATES DISTRICT COURT

STIPULATION FOR COSTS ON APPEAL—Filed April 9, 1937

Know All Men by These Presents, that Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Southern Pacific Company, a corporation, The Pullman Company, a corporation, et al., Defendants in the above entitled case, in the penal sum of Two hundred fifty and no/100 (\$250.00) Dollars, to be paid to said Defendants, their successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation is Such, That Whereas Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his Guardian ad litem, are about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment made on December 29th, 1936, and entered on January 22nd, 1937 by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

[fol. 133] Now, Therefore, if the above named appellants shall prosecute said appeal to effect and answer all costs which may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Signed, sealed and dated this 9th day of April, 1937.

Fidelity and Deposit Company of Maryland, by W.
H. Cantwell, Attorney in Fact. (Seal.)

Attest: Theresa Fitzgibbons, Agent.

Examined and recommended for approval as provided in Rule 28.

L. H. Phillips, Attorney for Appellants

Approved this 9 day of April, 1937.

Wm. P. James, District Judge

[fol. 134] STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 9th day of April, 1937, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

S. M. Smith, Notary Public in and for the State of California, County of Los Angeles. My Commission Expires Feb. 18, 1938. (Seal.)

[File endorsement omitted.]

[fol. 135] IN UNITED STATES DISTRICT COURT

PRECIPE FOR RECORD—Filed April 2, 1937

The Clerk of this Court is hereby directed to prepare and certify the transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals For The Ninth Circuit by including therein the following:

1. Plaintiffs' Motion to Remand to the State Court;
2. Second Amended Complaint;
3. Answer of The Pullman Company to the Second Amended Complaint;
4. Answer of A. J. Kash to the Complaint;

5. Answer of H. J. Hatch and Edward E. Myers to the Second Amended Complaint;
6. Answer of Southern Pacific Company and Fred M. Dolsen to the Second Amended Complaint;
7. Supplemental Answers of H. J. Hatch, The Pullman Company and A. J. Kash to the Second Amended Complaint;
8. Findings of Fact and Conclusions of Law;
9. Judgment;
10. Objections to Proposed Findings and Plaintiffs' Proposed Amendments;
11. Affidavit Supporting Objections to Defendants' Costs and Disbursements and Motion to Tax Costs;
- [fol. 136] 12. Objections to Defendants' Costs and Disbursements and Motion to Tax Costs;
13. Bill of Exceptions of March 3rd, 1937;
14. All certificates made by the Clerk of this Court with reference to the proceedings, rulings and decrees of the Court;
15. The Petition for Appeal and Plaintiffs' Assignment of Errors;
16. Orders of the Court and the Judge in chambers relating thereto;
17. Undertaking on Appeal;
18. The certificate of the Clerk of the record on Petition for Appeal herein;
19. Petition for Appeal;
20. All endorsements.

Dated this 15th day of March, 1937.

L. H. Phillips, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 137] IN UNITED STATES DISTRICT COURT

COUNTER PRAECIPE—Filed April 5, 1937

To the Clerk of Said Court:

SIR:

Please incorporate in the certified transcript of the record on appeal in the above entitled cause additional portions of the record as follows:

1. Complaint;
2. Petition for Removal;
3. Notice of Motion of Removal;
4. Amended complaint;
5. Removal Bond;
6. Order of Removal;
7. Stipulation filed December 27, 1935;
8. Dismissal filed December 28, 1936;
9. Order dated and filed January 22, 1937;
10. Notice of Ruling denying motion to remand, filed Feb. 27, 1936.
11. Order filed March 19, 1936;
12. Summons and returns thereon;
13. Demurrer of H. J. Hatch to amended complaint filed January 17, 1936.
- [fol. 138] 14. Minute Order entered January 29, 1936 sustaining demurrer of H. J. Hatch;
15. Request for balance of transcript filed March 9, 1936;
16. Order filed March 19, 1936;
17. All endorsements.

Dated this 2nd day of April, 1937.

Robert Brennan, M. W. Reed, Attorneys for Def'ts
H. J. Hatch and Edward E. Myers. Robert Bren-
nan, M. W. Reed, Leo E. Sievert, H. K. Lockwood,
Attorneys for Deft. The Pullman Co.

[File endorsement omitted.]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 138 pages, numbered from 1 to 138 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; amended complaint; notice of motion of removal; petition for removal; removal bond; order granting petition and approval of bond; order of removal; answer of A. J. Kash; stipulation and order thereon; demurrer of H. J. Hatch; motion to remand to State Court; order sustaining demurrer; second amended complaint; order denying motion to remand notice of ruling on order denying motion to remand; answer of the Pullman Company to the second amended complaint; request for balance of transcript; summons, and return thereon; answer of Edward E. Myers; answer of H. J. Hatch; order for additional transcript; answer of Southern Pacific Company and Fred M. Dolsen; dismissal; supplemental answer of A. J. Kash; supplemental answer of the Pullman Company; supplemental answer of H. J. Hatch; waiver of jury; order of December 29, 1936; order of January 22, 1937, regarding supplemental answer of Edward E. Myers; findings of fact and conclusions of law;

judgment; objections to proposed findings and proposed amendments by the plaintiff, and order thereon; objections to defendants' costs and disbursements and motion to tax costs; affidavit supporting objections to defendants' costs and disbursements and motion to tax costs; engrossed bill of exceptions; petition for appeal; assignment of errors; order allowing appeal; stipulation for costs on appeal; praecipe and counter praecipe.

I do further certify that the amount paid for printing the foregoing record on appeal is \$171.56 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to \$21.80 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 18th day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-seven and of our Independence the One Hundred and Sixty-first.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed May 20, 1937. Paul P. O'Brien, Clerk.

No. 8558

IN THE**United States Circuit Court of Appeals****For the Ninth Circuit**

**MRS. GARNETT V. JENKINS and ROBERT W.
JENKINS, by MRS. GARNETT V. JEN-
KINS, his Guardian ad Litem,**
Appellants,

vs.

**THE PULLMAN COMPANY, a corporation,
H. J. HATCH, EDWARD E. MYERS and
A. J. KASH,**
Appellees.

**Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

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United States Circuit Court of Appeals for the
Ninth Circuit.

Excerpt from Proceedings of Tuesday, February
1, 1938.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION, ETC.

Pursuant to oral stipulation of Mr. Henry N. Cowan, counsel for appellants, of Mr. M. W. Reed, counsel for appellee The Pullman Company, and of Mr. David Livingston, counsel for appellee A. J. Kash, for submission of this cause of briefs on file, and

Upon consideration of oral motion of Mr. M. W. Reed, for dismissal of the appeal herein, and motion to file formal motion to dismiss, and good cause therefor appearing,

It is ordered that this cause be submitted to the court for consideration and decision on briefs, with leave to counsel for appellees to file motion to dismiss appeal, with supporting authorities, within ten days from date, and with leave to counsel for appellants to reply thereto and file reply brief within fifteen days thereafter.

United States Circuit Court of Appeals for the
Ninth Circuit.

Excerpt from Proceedings of Tuesday, April 13,
1938.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND DISSENTING OPINION AND FIL-
ING AND RECORDING OF JUDGMENT.

By direction of the Court, ordered that the type-
written opinion and dissenting opinion this day ren-
dered by this court in above cause be forthwith filed
by the clerk, and that a judgment be filed and re-
corded in the minutes of this court in accordance
with the majority opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United
States for the Southern District of California,
Central Division.

OPINION.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

Haney, Circuit Judge.

Two procedural questions and one substantive
question are submitted to us, the former involving

removability of an action commenced in a state court, and the latter involving the effect of an instrument signed by appellant, after commencement of the action, as to whether or not it extinguished the entire action.

Southern Pacific Company, hereinafter called the railroad, is a Kentucky corporation. Robert L. Jenkins, a resident of California, was employed by it as a passenger conductor. Fred M. Dolsen, a resident of California, was employed by it as a gate tender at its passenger station in the City of Los Angeles, to examine tickets of passengers, before their entry through the gates to board trains.

The Pullman Company, hereinafter called the company, is an Illinois corporation. H. J. Hatch, a resident of California, was employed by it as a Pullman conductor. Edward E. Myers, whose place of residence does not appear, was employed by it as a Pullman porter.

The railroad hauls the company's sleeping cars and equipment under an agreement between them. Under rules of the railroad, its conductor or other officer in charge shall eject disorderly passengers from its trains, and is permitted to call to his assistance city, county or California State peace officers. Likewise, employees of the railroad are instructed to preserve order in and about its stations.

On March 29, 1935, the railroad ordered Robert L. Jenkins to take charge, as conductor, of its train, leaving Los Angeles destined for San Francisco. About eight o'clock in the evening of that day, the

railroad's gate tender, Fred M. Dolsen, permitted one A. J. Kash to pass through its gates in order to board the train, without displaying a ticket. Kash at that time was intoxicated, loud, boisterous, disorderly, and was using profane and indecent language. The Pullman conductor and the Pullman porter permitted Kash to board the train, and he continued his objectionable and annoying conduct. Efforts of the Pullman conductor to induce Kash to desist from his disorderly conduct failed. The Pullman conductor thereupon called Jenkins to assist him. Remonstrances of Jenkins had no effect. Jenkins called police officers of the City of Ventura to assist in ejecting Kash from the train at that place. The police officers arrested Kash, and as they were taking him from the train, Kash struck and injured Jenkins.

Jenkins died as a result of the injuries caused by the blow, on April 19, 1935. His wife, Garnett V. Jenkins, and his minor son, Robert W. Jenkins, survived him. On September 27, 1935, Garnett V. Jenkins was appointed guardian ad litem for Robert W. Jenkins, and individually, and as such guardian ad litem, brought an action against the railroad, its gate tender, the company, its conductor, its porter, and Kash to recover for the death of Jenkins, in a California state court.

The complaint contained two causes of action, the first being brought against, and grounded on the negligence of all defendants, and the second being brought against Kash only, and charged him with

assault and battery. Recovery of \$50,000 on each cause of action was prayed for. The first cause of action failed to allege that Jenkins was engaged in work, or performing services, which were a part of interstate commerce at the time of his injury, and failed to allege negligence of the Pullman conductor.

On November 20, 1935, the company filed in the state court, a petition to remove the cause to the court below.

On November 25, 1935, Garnett V. Jenkins individually, and as guardian ad litem for Robert W. Jenkins, filed an amended complaint in the state court,¹ containing two causes of action, being the same as those contained in the original complaint. The amended complaint alleged, in the first cause of action, the same facts as were contained in the first cause of the original complaint, but failed to allege negligence of the Pullman conductor. There was an allegation in the first cause of action of the amended complaint, that the action was brought, as against the railroad, under the Employer's Liability Act.

On the same day, November 25, 1935, an order of removal was made by the state court. On December 10, 1935, in a probate proceeding in the state court, Garnett V. Jenkins was appointed administratrix of the estate of Jenkins, deceased, and on Decem-

¹Counsel for appellees state that the railroad had filed, and the state court had sustained a demurrer to the original complaint, which may have been the reason for the amended complaint, although the record here does not disclose such fact.

ber 27, 1935, the court below made an order substituting Garnett V. Jenkins, as such administrator (hereinafter called appellant), as plaintiff, for Garnett V. Jenkins, individually and as guardian ad litem, pursuant to a stipulation.

On January 17, 1936, the Pullman conductor filed in the court below a demurrer. On January 22, 1936, appellant filed a motion to remand the cause to the state court.

The demurrer filed by the Pullman conductor was sustained on January 29, 1936. Appellant filed a second amended complaint on February 8, 1936. It contained the same two causes of action, the only essential difference being that the first cause of action of the second amended complaint alleged that at the time of his injury Jenkins was performing services which were a part of interstate commerce, and that the Pullman conductor was negligent. It was unlike the first causes of action in the original and amended complaints in those respects.

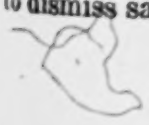
The motion to remand was denied by the court below on February 19, 1936. On December 7, 1936, appellant filed in the court below an instrument entitled "Waiver of Jury".

On December 21, 1935, Garnett V. Jenkins, individually, and as guardian ad litem executed and acknowledged a document entitled a "Covenant Not To Sue". In consideration of the sum of \$2,500 those parties by that document covenanted with the railroad that they would

"forever * * * refrain from instituting, pressing or in any way aiding any claim * * * or cause of action for damages * * * on account of * * * the injury or death of Robert L. Jenkins, deceased * * * which cause or causes are mentioned in that certain action entitled In the District Court of the United States, Southern District of California, Central Division, Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, plaintiff, vs. Southern Pacific Company, a corporation, et al. * * *"

Another provision was that "Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, his guardian ad litem, and the Southern Pacific Company, a corporation, do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms or corporations than are herein specifically named * * *"

On December 23, 1936, appellant filed a petition in the state court probate proceedings stating that she, as administratrix, had filed an action predicated upon an injury to the deceased, and that such action had been removed to the court below; and that she, as administratrix, had entered into a "Covenant Not To Sue" with the railroad, a copy of which was attached. She prayed for "an order confirming said Covenant Not to Sue and permitting the petitioner to dismiss said cause as against the Southern Pacific



Company". On the same day the state court ordered "that the Covenant Not to Sue entered into by and between Mrs. Garnett V. Jenkins, Administratrix, and the Southern Pacific Company, a corporation, be and is hereby confirmed and that she be permitted to dismiss said cause of action as against Southern Pacific Company, a corporation".

On the following day, the court below dismissed the action as against the railroad and the gate tender.

On December 29, 1936, the company, the Pullman conductor, the Pullman porter,² and Kash, all filed supplemental answers that the "Covenant Not to Sue" released³ the cause of action stated against them. The answers were treated as pleas in bar, and trial was had thereon on the same day. The court below held that the instrument "amounted to a release of the cause of action as to all of the defendants". See 17 F. Supp. 820. Findings and judgment of dismissal followed, on January 22, 1937. Appellant appealed from the judgment.

²The Pullman conductor's supplemental answer stood also as the supplemental answer of the Pullman porter because of a nunc pro tunc order made January 22, 1937.

³It should be noted that the supplemental answers are based on the theory that Garnett V. Jenkins, individually and as guardian ad litem released a cause of action held by "Garnett V. Jenkins, administratrix of the estate of Robert L. Jenkins, deceased". Neither party has presented argument as to whether anyone but the administratrix could actually release such cause of action.

Notwithstanding the fact that appellant had been substituted as plaintiff, the record here does not disclose that any of the parties noted or observed such substitution in either the captions or allegations of pleadings or other documents filed. The judgment for costs was against, and the appeal was taken by Garnett V. Jenkins, individually, and as guardian ad litem. At the argument appellees asked for, and were granted, ten days within which to file a motion to dismiss, on the ground that the appeal was not taken by the proper party. Within the ten day period, they declined to so move. Had the motion been made it would have been denied. Appellant has the right to amend. *Mo., Kans. & Tex. Ry. v. Wulf*, 226 U. S. 570, 576. In 49 C. J. 130, §135, it is said:

“* * * While a caption or title may be considered a proper formal part of a declaration, complaint, or petition, it has been said that, strictly speaking, a caption is no part thereof, except where by express reference thereto in the pleading itself it is made a part thereof; and accordingly it has generally been held that a defective caption, or no caption at all, is merely a formal defect and not fatal, which may be waived by answering to the merits * * *”

It would be a mere ceremony to remand the case so that the amendment might be made, and therefore we shall consider the appeal papers as amended. Cf. *Norton v. Larney*, 266 U. S. 511, 516; *Realty Co. v. Donaldson*, 268 U. S. 398, 400.

Appellees point out that appellant did not except to the order denying the motion to remand. Likewise, she does not appeal from such order.

At common law, the death of a human being was not a ground of action for damages.⁴ That rule, and the rule that a servant assumed the risk of his employment,⁵ prevented recovery from an employer for the death of an employee caused by the negligence of a fellow-servant.⁶

Many of the states, prior to 1908, had modified or displaced those rules by legislation. Second Employers' Liability Cases, 223 U. S. 1, 51. California first modified the common law in 1862 by statute. 8 Cal. Jur. 953, §15. In 1874 modification of the common law was made by statute. 8 Cal. Jur. 952, §15. That provision now effective is Code of Civil Procedure, §377, which provides in part:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person * * *"

⁴Insurance Co. v. Brame, 95 U. S. 754, 756; The Harrisburg, 119 U. S. 199, 204; Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 68.

⁵New England Railroad Co. v. Conroy, 175 U. S. 323, 327, 328.

⁶St. L. & San Francisco Ry. v. Seale, 229 U. S. 156, 157.

With respect to the question as to whether the employer was liable for the death of his employee caused by the negligence of a fellow servant, a provision, enacted in 1872, was amended by the employer's liability act of 1907 (Civil Code, §1970). 8 Cal. Jur. 954, §16. That provision has since been superseded by the Workmen's Compensation Act. 27 Cal. Jur. 250, §1; 8 Ca. Jur. Supp. 82, §16. Such provisions, however, are not applicable to an employer, which is a common carrier by railroad and engaged in interstate commerce, because by the Employers' Liability Act of April 22, 1908 (35 Stat. 65, Ch. 149), Congress has acted in that field, superseding state laws in such field. Second Employers' Liability Cases, 223 U. S. 1, 55.

Summarizing, we find that actions for wrongful death, if not against an employer, are governed by the state code section quoted; such actions against an employer, which is a common carrier by railroad and engaged in interstate commerce, are controlled by the federal Employers' Liability Act; and remedy for such death, against an employer not within that description, is that given by the California Workmen's Compensation Act (Tipton v. Atchison Ry. Co., 298 U. S. 141).

The Employers' Liability Act (45 U. S. C. A. §51) provides in part:

"Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by

such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such * * * death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *

That provision modified the common law. Second Employers' Liability Cases, *supra*, 49; and see *Chicago, R. I. & P. Ry. Co. v. Ward*, 252 U. S. 18, 21. Under that section an action to recover for the death of an employee must be prosecuted by the personal representatives of the deceased employee, and not by the beneficiaries,⁷ and the employee must have been engaged in interstate commerce at the time of the injury or death.⁸

Appellant contends that she stated a cause of action under the Employers' Liability Act, and that joinder, with such cause, of other independent causes of action should not defeat the provision in

⁷*American R. R. Co. v. Birch*, 224 U. S. 547, 558; *Mo. Kans. & Tex. Ry. v. Wulf*, 226 U. S. 570, 576; *Troxell v. Del. Lack. & West. R. R.*, 227 U. S. 434, 444; *St. L. & San Francisco Ry. v. Seale*, 229 U. S. 156, 158.

⁸*St. L. & San Francisco Ry. v. Seale*, *supra*, 158; *Ill. Cent. R. R. v. Behrens*, 233 U. S. 473, 478; *Pederson v. Del. Lack. & West. R. R.* 229 U. S. 146, 150; *Shanks v. Del. Lack. & West. R. R.*, 239 U. S. 556, 557, 558; *Erie Railroad Company v. Welsh*, 242 U. S. 303, 306.

the act that "no case arising under this chapter and brought in any State Court of competent jurisdiction shall be removed to any court of the United States". 45 U. S. C. A. §56.

Appellees contend that removability must be determined by the status of the case at the time the original complaint was filed;⁹ that all parties defendant, except the company and Kash, must be disregarded in determining the right of removal; that after disregarding such parties, it appears that the cause of action against the company was for negligence, and that the cause of action against Kash was for assault; and that such causes were severable and removal was properly allowed. Appellees say that the original complaint stated no cause of action against the railroad or the Pullman conductor, and therefore those parties should be disregarded;¹⁰ that the gate tender and the Pullman porter had not been served with process and should be disregarded.¹¹

There is authority that the subsequent amendments related back to the time of the original complaint,¹² and therefore the railroad and the Pullman

⁹Saint Paul Mercury Ind. Co. v. Red Cab Co., U. S. _____, February 28, 1938.

¹⁰Cella v. Brown (C. C. A. 8), 144 Fed. 742, cert. den. 202 U. S. 620; Peters v. Plains Petroleum Co. (C. C. A. 10), 43 F.(2d) 49, 50.

¹¹Community Bldg. Co. v. Maryland Casualty Co. (C. C. A. 9), 8 F.(2d) 678, 679, cert. den. 270 U. S. 652; Hunt v. Pearce (C. C. A. 8), 284 Fed. 321, 323, 324.

¹²Mo. Kans. & Tex. Ry. v. Wulf, 226 U. S. 570, 576; N. Y. Cent. R. R. v. Kinney, 260 U. S. 340; B. & O. S. W. R. Co. v. Carroll, 280 U. S. 491, 494.

conductor should not be disregarded.¹³ If they were not disregarded, the cause of action against the company and the Pullman conductor was not severable, and removal was improper. *Chesapeake and Ohio Ry. Co. v. Dixon*, 179 U. S. 131; *Southern Railway Co. v. Carson*, 194 U. S. 136, 138, 139; *Alabama Southern Ry. v. Thompson*, 200 U. S. 206; *Cincinnati & Texas Pacific Ry. v. Bohon*, 200 U. S. 221; *Chi. B. & Q. Ry. Co. v. Willard*, 220 U. S. 413, 425.

We think if it did not sufficiently appear at the time when the petition for removal was filed, that the cause was not severable, then it so appeared when the second amended complaint was filed. Under those circumstances we believe the duty of the court below is expressed in 28 U. S. C. A. §80, which provides in part:

"If in any suit * * * removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has

¹³*Chicago, R. I. & Pac. Ry. v. Schwyart*, 227 U. S. 184. In addition there are many cases where amendments are considered as relating back in determining questions as to whether or not a bill or complaint states facts showing the jurisdiction of a district court: *Chesapeake & O. Ry. Co. v. Coffey* (C. C. A. 4), 37 F.(2d) 320, 324; *Bison State Bank v. Billington* (C. C. A. 5), 228 Fed. 116, 117; *Baltimore & O. R. Co. v. M'Laughlin* (C. C. A. 6), 73 Fed. 519, 521; *Carter-Crume Co. v. Peurrung* (C. C. A. 6), 99 Fed. 888, 890; *Bowden v. Burnham* (C. C. A. 8), 59 F.(2d) 752, 754; *Carnegie, Phipps & Co. v. Hulbert* (C. C. A. 8), 70 Fed. 209, 218; *Goodman v. City of Ft. Collins* (C. C. A. 8), 164 Fed. 970, 973.

been * * * removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court * * * the said district court shall proceed no further therein, but shall * * * remand it to the court from which it was removed * * *

There is here no charge of fraudulent joinder, and we therefore have no occasion to mention the rules governing in such event.

Although the court below refused to remand the cause, we think it our duty to order it remanded. *Chi. B. & Q. Ry. Co. v. Willard*, supra; *McNutt v. General Motors, etc., Corp.*, 298 U. S. 178, 184; *K V O S, Inc. v. Associated Press*, 299 U. S. 269, 277; *Hare v. Birkenfield*, (C. C. A. 9), 181 Fed. 825.

Judgment reversed, with directions to remand the cause to the state court.

Mathews, Circuit Judge (dissenting):

This was an action against the Southern Pacific Company, the Pullman Company, Fred M. Dolsen and three other defendants for damages in the sum of \$50,000 for the death of Robert L. Jenkins (hereafter called decedent), an employee of the Southern Pacific Company.

The action was not brought by decedent's personal representative. It was brought by his widow and minor child. They did not bring it under the

Employers' Liability Act,¹ and could not have done so. They never had any right of action under the Employers' Liability Act. Obviously, therefore, this case did not "arise" under that Act.

Plaintiffs (decedent's widow and child) were citizens of California. The Southern Pacific Company was a citizen of Kentucky. The Pullman Company was a citizen of Illinois. The citizenship of the other defendants was not indicated. Between plaintiffs and the Pullman Company, there was a separable controversy, that is to say, a controversy which was wholly between them, and which could be fully determined as between them. Therefore, the case was removable² and, on the Pullman Company's petition, filed November 20, 1935, was duly and properly removed to the District Court of the United States.

On December 16, 1935, counsel for plaintiffs and counsel for some of the defendants stipulated that decedent's administratrix might be substituted as plaintiff in the place and stead of his widow and child. The administratrix was not a party to the stipulation. Nevertheless, on December 27, 1935, the District Court ordered that she be substituted as plaintiff. She paid no attention to the order. She never appeared, in the District Court or in this court. The substitution order was likewise ignored and disregarded by the original plaintiffs (decedent's widow and child) and by the District Court

¹45 U. S. C. A. §§51-59.

²Judicial Code, §28, 28 U. S. C. A. §71.

itself. The original plaintiffs were permitted to and did, thereafter as theretofore, prosecute the action in their own name. In permitting them to do so, the court, in effect, vacated and set aside the substitution order.

On January 22, 1936, the original plaintiffs filed a motion to remand the case to the State court. The motion was made on the wholly untenable ground that the District Court had no jurisdiction. It was not on the ground that the case was one arising under the Employers' Liability Act.³ Even if made on that ground, it would not have been well founded, since, as previously shown, the case did not arise under the Employers' Liability Act. The motion was properly denied.

On December 21, 1936, the original plaintiffs, in consideration of \$2,500 paid to them by the Southern Pacific Company, executed and delivered to that company a so-called "covenant not to sue," whereby they, the original plaintiffs, bound themselves "forever to refrain from instituting, pressing, or in any way aiding any claim, demand, action, or cause of action for damages . . . for, on account of, or in any way growing out of . . . the injury or death of [decedent]."

On December 23, 1936, in the probate court having jurisdiction of decedent's estate, the administratrix filed a petition stating that she, the administratrix, had filed this action for damages and had executed the above mentioned covenant. The statement was untrue. The administratrix had filed no action

³45 U. S. C. A. §56.

and had executed no covenant. Her petition prayed for an order confirming the covenant and permitting her to dismiss this action as against the Southern Pacific Company. The probate court made such an order on December 23, 1936.

On December 24, 1936, the original plaintiffs filed in the District Court a motion for dismissal of this action as against the Southern Pacific Company and defendant Dolsen. The motion was granted, and a judgment dismissing the action as against the Southern Pacific Company and Dolsen was entered on December 28, 1936.

The case was tried on December 29, 1936. Judgment was entered on January 22, 1937. The judgment was against the original plaintiffs. It did not mention the administratrix. The original plaintiffs appealed from the judgment. The administratrix was not a party to the judgment, did not appeal therefrom, and is not before this court, as an appellant or otherwise.

I agree with, and adopt as my own, the trial court's opinion in this case.⁴

The judgment should be affirmed.

[Endorsed]: Opinion and dissenting opinion. Filed Apr. 19, 1938. Paul P. O'Brien, Clerk.

⁴Jenkins v. Southern Pacific Co., 17 F. Supp. 820, 823. I reject, however, the inadvertent statement (17 F. Supp. 821) that the action was brought by decedent's widow, "for herself, as executrix of the estate of her deceased husband." There was no executrix. There was an administratrix, but she did not bring or prosecute this action.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 8558.

MRS. GARNETT V. JENKINS, et al.,
Appellants,

vs.

PULLMAN CO., et al.,
Appellees.

JUDGMENT.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellants and against the appellees, and that this cause be and hereby is remanded with directions to the said District Court to remand the cause to the state court.

It is further ordered and adjudged by this Court that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered April 19, 1938.
Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

Excerpt from Proceedings of Friday, June 3,
1938.

Before: Garrecht, Mathews and Haney,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITIONS FOR
REHEARING.

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of The Pullman Company, filed May 18, 1938, and petition of A. J. Kash, filed May 28, 1938, within time allowed therefor by rule of court, or a valid extension thereof, for a rehearing of above cause be, and each of said petitions hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Messrs. Livingston & Livingston and Leo E. Seivert, Esq., counsel for the appellees, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including July 18, 1938; and in the event the petition for a writ of certiorari to be made by the appellees herein be docketed in the Clerk's

of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,

United States Circuit Judge.

Dated: San Francisco, California,

June 7, 1938.

[Endorsed]: Filed Jun. 7, 1938. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES.**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred sixty-three (163) pages, numbered from and including 1 to and including 163, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of June A. D. 1938.

[Seal]

PAUL P. O'BRIEN,

Clerk.

[fol. 165] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Robert Brennan. File No. 42,695. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 210. The Pullman Company, H. J. Hatch, Edward E. Meyers and A. J. Kash, petitioners, vs. Mrs. Garnett V. Jenkins and Robert W. Jenkins, by Mrs. Garnett V. Jenkins, His Guardian ad Litem. Petition for a writ of certiorari and exhibit thereto. Filed July 18, 1938. Term No. 210, O. T., 1938.

(8419)